

1070

Lex Spuriorum :
O R, T H E
L A W

Relating to
Bastardy.

Collected from the Common, Civil
and Ecclesiastical L A W S.

B Y
JOHN BRIDALL of *Lincolns-Inn*, Esq;

Lib. Sap. c. 4. v. 6.

*Ex Illegitimis congressibus geniti Liberi
Testes sunt Improbitalis adversus Pa-
rentes, quum de ipsis habetur Quæstio.*

*Children begotten of unlawful Beds are
Witnesses of Wickedness against their
Parents in their Trial.*

L O N D O N :

Printed by the Assigns of Richard and Edward
Atkins, Esquires ; for Thomas Osborne in
Grays-Inn, near the Walks. 1703.

FH

MVSEVM
BRITANNICVM

P
L
le
ex
ti
m

THE
PREFACE
TO THE
READER:

THE Motives that have
perswaded the Author to
make this small Tract
publick are several.

One whereof is, That no
Lawyer (as he could ever yet
learn) has hitherto written and
exposed to view any single Trea-
tise on the Subject of Illegiti-
macy or Bastardy.

The P R E F A C E.

Another is, To let the People of this present Age see, what great Disadvantages Children born out of Holy Matrimony do lie under; which might (as he conceives) very much deter Men and Women from ever pursuing unlawful and exorbitant Embraces, of which this Nation, as well as foreign Countries, have been deeply guilty.

His third and last Motive is, To shew the great Reception and Approbation Marriage hath met with in all Nations whatsoever; As likewise to tender to the World a sight of the Honour, Dignity and Privileges that have been yielded thereunto by the Constitutions of most Countries, more especially by such as are to be found in the Common, Civil and Ecclesiastical Laws. And
now

The P R E F A C E.

now upon a serious Consideration of such Advantages, what Man in his right Wits can inveigh against, or discountenance this Holy State? To which all Laws, as well Divine as Humane, do exhort us, Nature provokes us, Honesty doth draw us, infinite Benefits do invite us, all Nations shew us the Way thither, and lastly, Necessity of continuing the Race of Mankind doth constrain us.

The Author having given the Motives for his publishing the ensuing Sheets, has no more to say, whereby to detain the Candid Reader any longer from the Perusal of them, but only to ask his Pardon for what is done amiss: And the rather, for that he may hereafter rectify it, either by doing something that may
be

The P R E F A C E.

be better, or (which is undoubtedly the best way) by doing so no more. But if neither of these ways be sufficient to atone for Slips or Errors, the Author must be forced to make use of the most famous Emperor *Justinian* his Golden Sentence, for a Plea in Bar, against the Guilt of any Misprisions; namely, *In nullo aberrare, [seu in omnibus Irreprehensibilem esse] Divinae utique solius, non autem mortalis est Constantiae, seu Roboris.*

T H E

THE CONTENTS.

SECT. I.

THE Etymology of the Word Bastard,
with the several Appellations thereof.
Pag. 1.

SECT. II.

Bastard and Bastardy how defined. 4

SECT. III.

The several Sorts of Bastards. 6

SECT. IV.

The Effect of Bastardy. 15

SECT. V.

Bastards how Legitimated. 35

SECT. VI.

*How the Common Law differs from the
Civil and Canon Laws in point of Legi-
timation by subsequent Marriage.* 44

SECT. VII.

*To what Jurisdiction the Tryal of Bastardy
belongs.* 48

SECT.

The CONTENTS.

SECT. VIII.

Bastardy happening subsequent to Matrimony upon Divorce. 64

SECT. IX.

In what Cases Issue born within Marriage shall be reputed a Bastard, and in what not. 83

SECT. X.

Those that are born contrary to the usual time of Womens Delivery, after the Decease of their Husbands, how to be reputed. 92

SECT. XI.

In what Cases Bastard eigne may gain the Right of Inheritance against the Mulier puisne, and in what not. 98

SECT. XII.

How the Laws, both Common and Civil, have provided Remedy against Supposititious Births, for the Benefit of right Heirs. 111

THE

THE
LAW
OF
Bastardy.

SECT. I.

The Etymology of the word Bastard, with the several synonymous Appellations thereof.

THE Origination of words being found by experience to be profitable in all sorts of Learning, both Divine and Humane, I shall therefore begin with the derivation of the word BASTARD. It is a word that is deduced by some from the Belgick

B Bastard,

The Law of Bastardy.

Minshien 63.

Co. Lit. 244.2.

Fortescue c. 40.

Co. Lit. 123.2.

Bastard, from *Bast*, i. e. *Abiectus*, and *Aeard*, i. e. *Natura*; as much as to say, One that is naturally base born. Others derive it from the word *Bassaris*, i. e. *Meretrix*, seu *Concubina*; in *English*, a *Harlot*, or *Whore*. Among the *Latins* are given to Bastards several Appellations; as, *Nothus*, *Spurius*, *Manzer*, *Favonius*, *Illegitimus*, *Adulterinus*, *Vulgò quæsitus*, *Vulgò conceptus*, *Filius populi*, and *Nullius filius*: Of which two last Appellatives a certain Poet writeth thus:

Cui pater est populus, pater est sibi, nullus & omnis.

Cui pater est populus, non habet ipse patrem.

And to all these prementioned Names the Grammarians add *Submissitius*, *Supposititius*, *Subdititius*, and *Inventitius*. As for the words *Nothus*, *Spurius* and *Favonius*, the Learned give us this Account of the Original.

Minshien 63.

1. *Nothus*, in Greek Νόθος, *Suidas* and *Eustathius* say, is compounded of the Particle νη, *habente vim privantis*, and of the Greek θεῖος, i. e. *Divinus*, so that *Nothus* properly signifies *Non Divinus*, i. e. *Quasi Divino Matrimonii usu privatus*; And *Isidore* makes this difference between it and *Spurius*, That *Nothus* is taken for him that is begotten by a Noble Father, and

The Law of Bastardy.

3

and of an Ignoble Mother ; and on the other hand, *Spurius* is he that is generated of a Noble Mother, and of an Ignoble Father.

2. *Isidore* saith, That Bastards were called *Spurii*, because they were born out of Purity, for that such kind of Lust is contrary to holy Matrimony, whose Bed is undefiled, and therefore the other corrupt & abominable. But the old *Roman Lawyers* tell us, That Bastards were called *Spurii*, *παρὰ τὴν σποράν*, i. e. *a Semine*, vel *παρὰ τὴν στείραν*, ἢ *παρὰ τὴν σποράν*. Ridley's View, Part 3. c. 4. sect. 2. Instit. l. 10, 12. D. 1. 5. 23.

3. And why a Bastard is termed *Favonius*, is, as if he were nothing but *Terræ-filius*, rising out of the ground like the Wind, or as if he were begotten of the Wind, (which we know not from what part of the Earth it comes) without the help of a Father, like the Eggs which they call *ὑπνέματα*, made by the Hens without the help of the Cock. In allusion to which, *Lucian* calls *Vulcan* *ὑπνέμων μῦθος*, because they feigned him to be born of *Juno*, but begot of the Wind, or they knew not whom. Roussé's Arch. Att. lib. 5. c. 9. p. 222. Edit. 1649.

B 2

SECT.

SECT. II.

Bastard and Bastardy, how defined.

SEeing *Plato, Aristotle*, and all the old Philosophers, both held and taught, That the course of all Disputation ought to be derived first from the Definition; for you cannot make a plain Discourse of any thing, unless you first lay down what it is: I shall therefore offer a Definition both of **Bastard** and **Bastardy**.

Expos. of terms
of the Law,
f. 41. b. verbo
Bastard.

I. *A Bastard is he that is born of any Woman not married, so that his Father is not known by the Order of the Law, and therefore is called the Child of the People.*

Ridley Part 3.
c. 7. sect. 2.

II. *Bastardy is an unlawful state of Birth, disabled by Divine and Humane Laws to succeed in Inheritance.*

And it is well said by *Divine*; for it is not only Humane Laws, which say, that none can inherit that are not born in

The Law of Bastardy.

5

in Matrimony, but God calls *Isaac Abraham's only Son*, although at the same time *Abraham* had his Son *Ismael* by *Hagar*, his Handmaid or Concubine; And *Abraham* gave all he had to *Isaac*: but to the sons of the Concubines which *Abraham* had, he gave (a) gifts, and sent them away from *Isaac* his son (while he yet lived) eastward, to the East Country, Gen. 25. v. 5, 6. So though *Ismael* were *Isaac's* elder Brother, yet in comparison of *Isaac* born in Wedlock, God himself did not account him *Abraham's* Son. Nor can one instance be given, that ever, either by God's Command or Permission, any born out of Marriage did inherit. By the Law therefore of God, as well as Man's Law, none can inherit that are born out of Matrimony.

(a) To avoid
dissention that
else might have
come because
of the Inheri-
tan.e.

Mr. Roger Cokes
of Inheritance,
l. 3. c. 2. sect. 3.

S E C T. III.

The several sorts of Bastards.

OF Bastards, or Children begotten out of lawful Matrimony, there be, according to the Lawyers both Civil and Common, divers sorts.

Co. Lit. 244.2. Our Common Lawyers give us an Account of three kinds of Bastards, viz. *Manser*, *Notbus* and *Spurius*, which are described in these two following Verses:

*Manseribus scortum Notbo Mæchus dedit
ortum:*

Ut Seges è Spica, sic Spurius est ab Amica.

Ybid.

But in the Common Law, all are termed by the Name of *Bastards*, that be born out of lawful Marriage.

Swinburn's
Tract of Wills
part 5. sect. 7.

As for the *Imperial Jurisconsults*, they inform us, that there are to be found in the Body of the Civil Law five sorts of *Bastards*.

Ridley's View
of the Civil &
Eccles. Law,
part 3. c. 7.
sect. 3.

I. The first sort is such as are begotten and born in simple Fornication, that is to say, of Carnal Copulation betwixt single Persons, such as at the time

The Law of Bastardy.

7

time of the Conception or Birth of the Child may be married together, if they will; and such kind of Bastards are called *Filii*, or *Liberi Naturales*, because they were begot by such as they held for their Wives, and yet were not their Wives, who might be legitimated by sundry ways, as shall be shewn by and by.

Liberi naturales dicuntur, qui non ex iustis nuptiis sunt procreati. Grat. 32. l. 4. c. 15.

Note, As there is Issue Natural, but not Lawful, so there is Issue Lawful, but not Natural, and likewise both Lawful and Natural: The first is (as has been said) begotten between two single persons in simple Fornication, without any subsequent Marriage. The second is that which is begotten in Adultery. The last is that Issue which is begot and born in lawful Wedlock. But here mentioning Issue Natural, I cannot pass over with silence a passage that I met withal in *Cambden*, and 'tis this: "The Iniquity of those Times (saith he) and the Love of the Estates of *England* towards their Prince and Country, exerted a Law for preventing the Practices of seditious persons, whereby it was enacted and provided amongst other things, That if any man during the Queens Life should by any Book written or printed expressly affirm, that any person is, or ought to be, Heir or Successor to the

Cambd. Eliz. Anno 1571. p. 142, 144. Engl. Edit. 1635.

The Law of Bastardy.

“ Queen, except the same be the NA-
 “ TURAL ISSUE of her Body,
 “ he should incur such and such pe-
 “ nalties. It is incredible (saith the
 “ Historian) what Jestlewd Catchers of
 “ words made amongst themselves, by
 “ occasion of that Clause, *Except the*
 “ *same be the Natural Issue of her Body;*
 “ forasmuch as the Lawyers term those
 “ Children *Natural*, which are gotten
 “ out of Wedlock, whom Nature alone,
 “ and not the Honesty of Wedlock,
 “ hath produced; and those they call
 “ *Lawful*, according to the ordinary
 “ Form of the Common Law of *England*,
 “ which are lawfully procreated of the
 “ Body”. Infomuch as *Cambden* him-
 self, being then a young man, did hear
 them often say, that that word was in-
 serted into the Act on purpose by *Lei-*
cester, that he might one day impose
 upon the *English* some Bastard-Son of
 his own, for the Queens Natural Is-
 sue.

2. The second sort of *Bastards* are
 such as are begotten on a Woman whom
 the Father of the Child never designed
 to hold constantly for his Concubine,
 but made use of her only to satisfy his
 present Lust, whether the Father be a
 married, or single Man; and these
 were called *Spurii*, whose Fathers are
 not

The Law of Bastardy.

9

not otherwise known than by the Mothers confession, which sometimes saith true, sometimes otherwise.

3. The third sort of *Bastards* were such as were born of Women, single or married, that prostituted themselves to every Man's pleasure, and made publick profession of themselves to be Harlots; and these Bastards were called *Manzeres*.

4. The fourth sort of *Bastards* were such as were begotten of married Women, and were called *Notbi*, because they seemed to be his Children whom the Marriage doth shew, but are not, no otherwise than some Fevers are called *Notba*, that is, Bastard-Fevers, because they imitate the *Tertian* or *Quartan* Fever in heat, but yet are neither *Tertians* nor *Quartans*, as the Learned Physicians well know: But these are counted so to be Bastards, if either the Husband were so long absent from his Wife, as that by no possibility of Nature the Child could be his; or that the Adulterer and Adulteress were so known to keep company together, as that by just account of Time it could not fall out to be any other Man's Child but the Adulterer's himself. Of this kind of Learning more largely hereafter.

5. The

5. The fifth and last kind of *Bastards* are those that are begotten in *Incest*, that is to say, betwixt such persons as are prohibited to marry, by reason of *Consanguinity* or *Affinity*.

Touching this most impious and last kind of Bastards, as also Incest, and Incestuous Marriages, it will not be amiss to subjoin these few Remarks.

Godwin's Rom.
Antiq. lib. 3.
sect. 1. c. 8.
p. 156, 157.
Edit. 1648.

1. Amongst the Old Romans, young Maids, when they were married, were wont to have a Marriage-Girdle tied about their middle, which the Husband on the first night of their Marriage should untie; whence *Zonam solvere* hath been translated, *To deflower a Virgin*. This Marriage-Girdle in former times was called *Cestus*, from whence cometh the Latin *Incestus*, and thence the English word *Incest*; which in truth signifieth all kind of Pollution committed by undoing or untying this Girdle called *Cestus*: but now in a more strict acceptation it signifieth only that kind of Naughtiness which is committed between two of near Kin; and that other Folly which is committed with another's

The Law of Bastardy:

II

ther's Wife, is now properly called *Adulterium*; and that which is committed with a Maid, or Widow, *Stuprum*.

2. By a Constitution of the Emperor *Justinian*, those that are guilty of wicked and incestuous Marriages are to forfeit all that they have unto the Exchequer; for that when they might make lawful Marriages, they rather chuse to make unlawful ones.

N. 12. c. 1.
Cod. 5. 5.
de Incestu
Nuptiis.

3. He which doth contract Incestuous Marriage, is by the Civil Law not to dispose any Goods or Chattels by his Testament or last Will, either to his Children begotten in such Incestuous Marriage, or to any other person, saving to his Children begotten in lawful Marriage, (if he have any by a former Wife) or to his Parents, or to his Brother or Sister, or to his Uncle or Aunt.

Cod. 5. 5. 6.
Swinburn's
Tract of Wills
part 2. sect. 17.

4. By the Canon-Law, incestuous Persons are reckoned among the Infamous.

Gratian. Qu. 1.
c. 17.

5. By

Covar. de
Spons. & Matr.
part 2. cap. 2.
parag. 6. c. 8.
Lex illa, § In-
cestus 36. q. 1.

5. By Incestuous Marriages, we are to understand such Marriages as are solemnized or had betwixt a Man and a Woman, being of Kindred or Alliance the one to the other, within those Degrees of Consanguinity or Affinity within the which it is not lawful to marry; that is to say, within the *Levitical* Degrees, or the Degrees prohibited by God's Law.

32 H. 8. c. 38.
Womans Law-
yer, lib. 2. sect.
29.

6. At this present, by the Statutes of this Realm, it is declared and established to be lawful for all persons to marry, which be not prohibited by God's Law, and that no Prohibition (God's Law excepted) shall trouble or impeach any Marriage not forbidden by the *Levitical* Degrees.

Amesius de
Conscientia l. 5.
cap. 35. q. 3.

7. Those Degrees of Consanguinity and Affinity within which it is unlawful to contract Matrimony, cannot safely be defined by the direction of Conscience, but only by the Law of God delivered by *Moses*, *Levit.* chap. 18. wherein is unfolded the Law of Nature.

8. Those

8. Those persons are to be reckoned within those Degrees, which have the same reason to be reckoned there, as those which are, though they be not expressly named; As, because in the Law the Nephew is forbidden to marry with his Father's or Mother's Sister, it follows, that the Marriage of the Uncle with his Brother's or Sister's Daughter is also prohibited. *Vide Co. 2 Inst. f. 683, 684.* Amesius l. 5. c. 35. Q. 3.

9. *Si adversus jus Leviticum aliqui coiverint, nec vir, neque uxor, nec nuptiæ, nec matrimonium, nec dos intelligitur. Et ii, qui ex tali coitu nascantur, naturales tantum sunt.* *Vide Co. Inst. l. 10, 12.* Cowell's Inst. l. 1. Tit. 10. sect. 16. 32 H. 8. c. 38.

He that desires to know whether a Man may marry two Sisters successively, or a Woman two Brothers, &c. let him at his leisure consult *Justinian, Cod. 5. 5. 5, & 8. & Gothofred. ad loca. Grotius de Jure Belli & Pacis, lib. 2. c. 5. sect. 12, 13, & 14. Cambden's Eliz. Anno 1558. pag. 4. English Edit. 1635. Lambard in Canones Edgari, Canon. 21. f. 78. Edit. 1644. Decret. Greg. lib. 4. tit. 19. cap. 9. Dr. Burnet's Collection of*

The Law of Bastardy.

of Records, N. 34. pag. 89. First part of the History of the Reformation, and Sir *Edward Coke's* Exposition upon the 38 *H.* 8. cap. 38. concerning what Marriages be lawful, and what not, 2 *Inst.* f. 683.

SECT.

SECT. IV.

The Effects of Bastardy.

THe Effects of all the foregoing Bastardies are divers.

1. The first Effect is, That Bastardy Ridley's View of Laws, part 3. c. 7. sect. 2. p. 352. Edit. 1675. staineth the Blood; for that he who is of a Bastard, is not permitted to challenge to himself either Honour or Arms from the Father or Mother, because he was begot and born out of the holy Bond of Wedlock; according to that Maxim of the Civil Law, *Patris Nobilitas transit ad Legitimos, non transit ad Nothos, neque potiuntur Nothi privi legiis, & dignitate parentum, ut cæteri filii.* Tiraquellus de Nobilitate, cap. 15. p. 102.

2. The second Effect of Bastardy is, Ridley's View of Law, part 3. c. 7. sect. 2. p. 352, 353. Edit. 1675. That it renders him that is an Illegitimate liable to reproach; for that he was begot and born out of Matrimony, which is the first step to Honour, and therefore the Apostle calleth Marriage Honourable, *Hebr. xiii. 4.* Upon which it necessarily follows, that the opposite or contrary thereof is Shame and Disgrace;

The Law of Bastardy.

grace; for, though it be no fault for a Bastard to be such a one, yet it is a Dishonour derived from the Parents on the Child, and a thing easily subject to Contumely and Reproach.

As for the Dignity of Matrimony, these subsequent Considerations, if well weighed, will make it more conspicuous and more illustrious.

1. We are to consider the Original and Antiquity of the Society called *Marriage*, God himself being the Author thereof; for he had no sooner created the first Man, but he purposed to give him a Wife, for a faithful Companion, a Comfortress of his Life, and a Help like unto himself; which he performed as soon as he thought upon it, forasmuch as with Him to *will*, is to *be able*, and to *do*; as likewise, to *be able*, and to *do*, is to *will*.

2. God instituted this Divine Mystery for the general Increase of Mankind, and lawful Propagation of Nature, even in the time of Innocency, before Man had sinned, sanctifying it, at the same time, with his Blessing.

3. We

3. We must remember that our Saviour Christ Jesus honoured a Wedding with his Presence and that too with a Miracle, even with the first, which he wrought in this World.

4. We see, that Marriage hath been continued throughout all Ages, until this present received; and approved of all Nations, both *Hebrews, Greeks, Latins* and *Barbarians*, so that there is no Nation under the Cope of Heaven, how barbarous so ever it be, and void of all Civility, which sheweth not great Joy, and Delight at Wedding-Feasts.

5. The *Romans* (who were a pattern of Virtue to all Nations) ordained Punishments for such as would not Marry, forbidding them all publick Dignities, and depriving them of those which they had obtained; nay, even by the *Papian Law*, those who were not married even at the Age of 25 or thereabouts were incapable of receiving, or giving Legacies, and degraded also from many civil Privileges. And to invite them the rather to Marry, they appointed Privileges for them, that had Children, so that he was most benefited, and preferred to publick
C Honours,

The Law of Bastardy.

Pomponius publice interest dotēs mulieribus conservari cum cum dotatas esse sēminas ad sobolem procreandam replendamque liberis civitatem maxime sit necessarium,
D. 24. 3. 1.

Honours that had most Children. When *Augustus Cæsar* was Cenſor, Enquiry was made by his Authority of a Roman Knight that had broken the Law, and would not Marry, whereupon he should have been punished, but that he proved that he had been Father of three Children. Add hereunto, That the Common-wealth of *Rome*, the Dowries of Women had always great Privileges. *What is the Cause* (saith the Lawyer *Ulpian*) *that Womens Dowries had such great Privileges?* It was for no other Reason, than because of the Profits, that cometh to all Common-wealths by Marriages. He that had three Children among the Romans could not be compelled to carry a Message, or publick Embaſſy: He that had five was exempted from personal charge: And he that had thirteen from all manner of charge whatsoever in the Common-wealth.

*Fleta lib. 1.
c. 5. Cowell's
In. lib. 1. tit.
9. sect. 1.
Bract. lib. 1.
c. 6. nu. 7.*

3. The third effect of Bastardy is, that the party Illegitimate is of no reckoning, or esteem in Law; for that saith, That a Bastard is *Filius Terræ, Filius Populi, & quasi nullius filius*; and it is a Rule thereof, *Qui ex damnato coitu nascuntur, inter liberos non computantur.* And tho' a Bastard be a reputed Son, yet he is not such a Son in Consideration of Law, whereof an use can be raised,

The Law of Bastardy.

19

raised, because in Judgment of Law, he is *nullius filius*, *Dyer* 274. *b. Co. Lit.* 123. *a.* And for the same Reason, where the Statute of Wills speaketh of Children, Bastard Children are not within that Statute, and the Bastard of a Woman is no Child within that Statute, where the Mother Conveys Lands unto him, 14 *Eliz. Dyer* 313. and 18 *Eliz. Dyer* 345. *Co. Lit.* 78. *a.* and 123. *a. b.* No *Lit. Sect.* 188. Bastard can be so much as a Villain, unless he will acknowledge himself to be such in a Court of Record; for he is in Law, *quasi nullius filius*, because he cannot be Heir to any.

A Bastard can have no Heir but of *Br. Esch.* 34. his Body, and dying without Issue, his *Fitzh.* 144. *c.* Lands purchased by him shall Escheat, *Finches Law, Lib. 2. c. 4. f. 130.* Register *f. 164. b. Perkins, Sect. 46. Kitchen f. 219. tit. Escheats Edit. 1651. Cowells Institutes, lib. 3. tit. 1. n. 11. p. 146. Bacon's use of the Law, pag. 29.*

A Bastard cannot be of Kin to any, and therefore it can be no principal Challenge, *Co. Lit. f. 157. a.*

The Condition of Bastards was heretofore among the People of God very Contemptible, as appears out of *Deut. 23. 2.* *A Bastard shall not enter into the Congregation of the Lord, even to his tenth Generation, shall he not enter into the Congregation of the Lord.* Wisdom of Solo-

The Law of Bastardy.

Leviticus 3. ver. 16, 17. *The Children of Adulterers shall not come to their perfection, and the Seed of an Unrighteous Bed shall be rooted out; for tho' they live long, yet shall they be nothing regarded, and their last Age shall be without Honour, Eccclus. 23. Children gotten in Adultery shall not take Root, and her Branches shall bring forth no Fruit; the Adultress shall leave her Memory to be cursed, and her reproach shall not be blotted out.*

To conclude, neither our Law, nor the Canon Law will admit Bastard slips to Holy Orders; they are incapable of the Priesthood, or of any Spiritual Promotion; but in case they are received to any Dignity, or Preheminence in the Church, there must be a Dispensation granted by the Sovereign Prince, *Fortesc. c. 40. f. 95. a. Cowell's Inst. lib. 1. tit. 10. n. 17. Co. lib. 5. Cawdries's Case, Davy's Rep. 73. a. le Case de Commendam 11. H. 7. 12. c.*

Speaking here of Priesthood, it puts me in mind of a Story, that I have read of a King's Bastard Son, who refused a Bishoprick rather than he would renounce his Father, or deny himself to be of the Blood Royal: And the Story is this, Our King *Henry the Second* had a natural Son called *Morgan* (by the Wife of one *Ralph Blewet* a Knight) who lived to be a Provost of

Beverly,

Daniel's History p. 112, 113, and Baker's History p. 66. in vita H. 2.

The Law of Bastardy.

21

Beverly, and to be elected to the Bishoprick of *Durham*; and coming to *Rome* for a Dispensation (because his Bastardy made him otherwise incapable) the Pope willed him to profess himself *Blewett's* Lawful Son, and not the King's Natural Son, promising to consecrate him upon that condition: But he absolutely answered, *He would for no cause deny his Father; and chose rather to lose the Dignity of the Place than of his Blood, as being the Son, though but the base Son, of a King.*

4. The fourth and last Effect of Bastardy is, That it excludes him that is a Bastard from all Succession, descending from the Father or the Mother, as 'tis holden both in the Common, Civil, and Canon Laws.

I. *The Common Law of England.*

Lib. 1. c. 7.
f. 13. b.

Lib. 1. c. 20.
f. 35. b. 36. a.

Lib. 2. cap. 3.
f. 117. Edit.
1627.

Inst. 1. 3. tit. 1.
n. 11.

“ By the Custom of the Realm (saith
“ the *Doctor and Student*) the Child
“ that is born before Espousals is a Ba-
“ stard, and shall not inherit. Again,
“ If a Man have two Sons, one before
“ Espousals, and another after Espou-
“ sals, and after the Father dies seized
“ of certain Lands: In this case the
“ younger Son shall enjoy the Lands
“ in this Realm, as Heir to his Father
“ both in Law and Conscience; and
“ the cause is, Because that Son born
“ after Espousals is by the Law of this
“ Realm the very Heir, and the eldest
“ Son is a Bastard.

“ He that is begotten (saith *Finch*)
“ out of Marriage, is called a Bastard;
“ and such a Bastard is of Blood to
“ none, in Law *nullius filius*, and there-
“ fore cannot inherit, nor bring a Writ
“ of *Detinue* as Heir. 35 H. 6. 9.

Proles, saith *Cowell*, *ante Matrimoni-*
um solemnizatum genita, jure Regni No-
thus, sive Bastardus est, neque in hæredi-
tatem succedit. Vide *Perkins* sect. 48. in
fin. *Tit. Grants. Litt. sect. 188. Fortescue*
cap. 39. f. 90. a.

II. *The*

II. The Civil Law.

Liberi ex incestuosis complexibus scienter N. 12. c. 1. & factis nati, non censentur legitimi, neque N. 89. cap. 15. parentibus succedant.

He which is begotten or born in Adultery or Incest, is not only incapable in respect of his Father's Testament, but is also excluded from all Testamentary Benefit by his Mother. *Vide Covar. Epitom. de Sponsal. Part 2. cap. 8. n. 15.* Swinburn Part 5. sect. 7.

III. The Canon Law.

St. Augustine, cited by Gratian, speaks thus: *Quid est [Quicumque dormierit cum cognata sua, sine filiis morietur] cum filii ex hujusmodi conjunctionibus, & ante nati sint, hodieque nascuntur? Ante hoc intelligendum Lege Dei constitutum, ut quicumque ex ijs nati fuerint, non deputentur filii, id est, nullo parentibus jure succedant?* Gratian. 35. Q. 7. c.

Having given an Account of the fourfold Effect of Bastardy, I will now start some *Quæres* relating to Bastards.

I Q. *Whether there be any Laws that have made provision for them?*

Sol. " Though the Roman Laws (saith
" Grotius) made no provision for Chil-
" dren that were Illegitimate, and by
" Solon's Law it was provided, That no
" Man should leave any thing to his
" Natural Issue, yet do the Canons of
" our Religion correct the severity of
" these Laws, by teaching us, That
" our Children, however begotten by
" us, should be a part of our care; and
" that, in case it be needful, we ought
" to leave them enough to preserve that
" Life which we gave them: but be-
" yond Necessaries is no Man bound
" by the Law of Nature to provide
" for them *Lib. 2. cap. 7. sect. 4. De jure
Belli & Pacis.*

Thus much for *Hugo Grotius*; let us now see what Mr. *Swinburn* saith as to the point of Alimentation.

By

The Law of Bastardy.

25

By the Laws Ecclesiastical, Bastards are capable of so much of that which is bequeathed unto them by their Incestuous and Adulterous Parents, as will suffice for their competent Alimentation or Relief; that is to say, for their Food, Cloathing, Lodging, and other meet and convenient Necessaries, according to the Wealth and Ability of the Parents. And although the Civil Law, (a) in detestation of this heinous Sin of Incest and Adultery, did deprive this Incestuous and Adulterous Issue of the hope of all Testamentary Benefit, though it were left for and in the name of *needful Relief*, the rather by this means to restrain the unbridled Lusts of some, and to preserve the Chastity of others: nevertheless, forasmuch as Nature hath taught all Creatures to provide for their young, so that the very (b) brute Beasts have a natural care to bring up whatsoever they bring forth: seeing also in Equity the poor Infants ought not to be punished, (at least not to perish for want of Food, by occasion of the Father's fault, whereof they were altogether (c) innocent:) Therefore the Ecclesiastical Law, whereby not only Adulterous, but Incestuous Issue also, is made capable of so much as is sufficient for convenient Maintenance, hath prevailed against the rigour of the Civil

Swinburn's
Treat. of Wills,
Part 5. sect. 7.
f. 200. a. b.
Edit. 1590.

(a) *Ex completo nefario aut incesto, seu damnato liberi, nec naturales sunt nominandi, omnis paternæ substantiæ indigni beneficio, ut nec alantur a patre*
Cod. 5. 5. 6.
n. 74. c. 6. &
n. 89. c. 15.

(b) *D. I. I. I. 3. Videmus cetera quoque animalia, feras etiam, istius juris peritiam censeri.*
Deut. 24. 16.
Ezek. 18. 20. 2.
Kings 14. 6. 2.
Chron 25. 4.
Jer. 31. 29, 30.
Cod. 9. 47.
22.

Grot. de Jure
Belli & Pacis,
l. 62. c. 21.
sect. 12, & 13.

The Law of Bastardy.

38 Eliz. c. 3.

(d) Ubi enim
Lex non distin-
guir, nec nos
distinguere de-
bemus.

D. 6. 2, 8,

Civil Law, and is to be observed especially in the Ecclesiastical Court, as more agreeable to Nature, Equity and Humanity; and in this respect the Laws and Statutes of this Realm are no less to be commended, in having provided as well for the convenient Relief and Keeping of poor and miserable Children, begotten and born out of lawful Matrimony, at the Charges of the reputed Father or Mother, (without distinction whether such Infants were begotten in Incest, Adultery, or Fornication (d).

Q. 2. Bastards, whether and how far they be capable of any benefit by the Laws of England?

Perkins sect.
48. Tit.
Grants, sect.
505. Tit. De-
vices.

Braet. lib. 2.
c. 7. n. 1. f. 20.
b. Fleta lib. 3.
c. 10. n. 1.
Cowell's Instit.
lib. 1. tit. 2.
de Adoptioni-
bus.

Sol. The Laws of this Realm do permit every Man, as well by Deed, as also by their last Wills and Testaments, to give and to devise unto any their Bastards, without distinction, all their Lands, Tenements, or Hereditaments, without restraint, at the least more than will suffice for their maintenance, and much more (says *Swinburn*) than they are worthy of; which thing cannot but redound to the great prejudice of right Heirs, considering the danger whereunto lawful Children are subject, and which they do many times sustain, through the too-often and too-persua-

five

five flatteries of vile dissembling Harlots, no less void of all Modesty, than well versed in all kinds of Subtilty, with whose sweet Poyson and pleasant Sting Prov. 5. many Men are so charm'd and enchanted, that they have neither power to hearken to the just Petitions of a virtuous Wife, praying and craving for her Children, nor Grace to deny the unjust demands of a vicious and shameless Whore, intreating for her Bastards; never remembring, that when *Sarah* said to *Abraham*, *Cast out this bondwoman and her son, for the son of this bondwoman shall not be heir with my son Isaac*, *Abraham* by the Commandment of God harkened to the voice of *Sarah*, never once regarding (that which divers have diligently noted) that the brood of Bastards are commonly infected with the Leprosie of the Sires Disease, (a) and being encouraged with the Example and Pattern of their Fathers filthiness, they are not only prone to follow their sinful steps, but do sometimes exceed both them and others in all kind of Wickedness. *Swinburn* Part 5. sect. 7. pag. 200. b. 201. a. Edit. 1590.

(a) Mali corvi, malum ovum, & metuenda sunt paterni criminis exempla. Cod. 9. 8. 4.

Q. 3. A Bastard having acquired a Name by Reputation, whether he may purchase Lands by such reputed Name?

Sol. A Bastard having gotten a Name by Reputation, may purchase by his reputed or known Name, to him and his Heirs, although he can have no Heir but of his own Body, Co. Litt. fol. 3. b.

39 E. 3. 11.

Co. lib. 6.

Sir Moil Finch's Case.

Vid. Hobart's

Rep. f. 32.

Counten vers.

Clerk.

If a Grant be made to a Bastard by the Sirname of him who is supposed to beget him, it is good and valid in Law, if he be known by such Name. So if a Remainder be limited *Richardo filio Richard' Marwood*, it is good, although he be a Bastard, - if in vulgar reputation and knowledge he be known by such Name; and yet in Truth and in Law he is *nullius filius*.

In 41 E. 3. 19 there is a notable Case, which is this: *R. T.* had Issue *Agnes* by one *Johan*, before Marriage and afterwards married the said *Johan*, and did make a Feoffment in Fee, and took back an Estate to him for Life, Remainder to *Agnes* the Daughter of *Richard* and *Johan*, and agreed that it was a good Remainder, without any Averment that she was known to be their Daughter: But there it was objected, That a Bastard is not their Daughter in Law, and therefore the Re-

The Law of Bastardy.

29

Remainder void. But there *Finchden* gave the Rule, and said, "It is found that the Daughter was born before the Marriage, so that by their Marriage after, she was their Daughter". In which it is observed, that although by the Common Law she was not their Daughter, yet because she had a colour by the Ecclesiastical Law, which saith, *Quod subsequens Matrimonium tollit peccatum præcedens*, this colour is sufficient in case of a Conveyance to make the Remainder good in Law.

Hitherto by what Name a Bastard may purchase Lands; now let us see by what Name he cannot. As for Example: A Man makes a Lease to *B.* Co. Litt. 3. 6. for Life, the Remainder to the eldest Issue-male of *B.* and the Heirs-males of his Body; *B.* has Issue a Bastard Son; he shall not take the Remainder, because in Law he is not his Issue; for *qui ex damnato coitu nascuntur, inter liberos non computantur*. And, as *Littleton*, (Sect. 188.) a Bastard is *quasi nullius filius*, and can have no Name of Reputation as soon as he is born. So if a Man make a Lease to *B.* the Remainder to the eldest Issue-male of *B.* to be begotten on the Body of *Jane S.* whether the same Issue be Legitimate or Illegitimate: *B.* has Issue a Bastard on the

The Law of Bastardy.

the Body of *Jane S.* this Issue shall not take the Remainder; for by the Name of *Issue*, if there had been no other words, he could not take; and a Bastard (as is said before) cannot take, but after he hath gained a Name by Reputation, that he is the Son of *B. &c.*

Q. 4. Whether Bastards have ever succeeded in the Dignities of the highest Condition?

Sol. We find in History, that Bastards have heretofore so succeeded. *Molossus* the Bastard succeeded in the Kingdom of *Epirus* by the Judgment of his Father *Pyrrhus*, having no lawful Issue. The *Tartars* make no difference between Bastards and them that are legitimate. *Mos est* (saith *Herodotus* of the *Persians*) *illis ut Nothus regnet, dum legitimus reperietur*, who admit of Bastards till one that is Legitimate may be found, *Jugurtha*, though a Bastard, yet succeeded in the Kingdom of *Numidia* by Adoption. Among the *Grecians*, if the Father of a Bastard were a Prince, or some great Potentate, being well born, he must needs be lawfully born, and so he was held in as great Esteem as any other, and enjoyed his Inheritance, *Consuetudinis Regiæ fuit, ut legitimam Uxorem non habentes aliquam licet Captivam*

Grot. de Jur.
Bell. & Pac.
l. 2. c. 7. sect.
12.

Rous's Archæol.
Attic. l. 5. c. 9.

The Law of Bastardy.

31

vam tamen pro legitima haberent, ut liberi ex ipsa nati succederent, says *Servius*. So it was a general Custom heretofore in France, that Bastards did succeed, even in Dignities of highest Condition, no otherwise than Children lawfully begotten.

Thierrie, Bastard of *Clovis*, had for his share with the lawful Children of the same *Clovis*, the Kingdom of *Austrasia*, now called *Lorrain*. *Sigisbert*, Bastard of King *Dagobert* the First, had his Part in the Kingdom of France with *Clovis* the Twelfth, lawful Son to *Dagobert*. *Loys* and *Carloman*, Bastards of King *Loys le Begue*, succeeded after the Death of their Father. So likewise in *England*, *Alfride*, Bastard-Son of *Oswine*, succeeded his Brother *Egfride*. So *Adelstane*, the Bastard-Son of *Edward* the Elder, succeeded his Father before *Edmund* and *Eldred*, his younger Brothers, notwithstanding they were lawfully begotten. So *Edmund*, surnamed *the Martyr*, Bastard-Son to King *Edgar*, succeeded him in the State, before *Ethelberd*, his lawful Issue. Afterward *Harold*, surnamed *Harefoot*, Bastard to *Canutus*, succeeded him in the Kingdom, before *Hardicanutus*, his lawful Issue. The like Custom hath been observed in *Spain*, in *Portugal*, and in divers other Countries. And it is probable

Sir John Hayward, p. 4, 5.
in vita W. 1.
Edit. 1613.

The Law of Bastardy:

(a) *Vide* the
causes of Ex-
cellency in Ba-
stards, in *Wind-*
lin's Moral
Philosophy,
lib. 1. de recta
vita, c. 3. q. 8.

Daniel in vita
Steph. & Hay-
ward in vita
H. 1.

bable that this Use was groundd upon
often Experience, That Bastards (as
begotten in the highest heat and
strength of (a) Affection) have many
times been Men of excellent Courage
and Understanding. This was verified
in *Jeptab, Hercules, Alexander the*
Great, Romulus, Rhemus, Timotheus, Bru-
tus, Themistocles, Arthur; in Peter Lom-
bard, Peter Comestor, Jo. Andreas, Gra-
tian, Charles Martell, John of Austria,
and divers others, whose Names for
their great Actions shall survive to all
Posterity; among whom *William* the
Conquerour may worthily be ranged,
as also *Robert* Earl of *Glocester* (Bastard-
Son of our King *Henry* the First) who
was a Man for Presence of Mind and
true Courage inferiour to none, and
in Council so advised, as was fit for a
great Commander. Furthermore, if
you look into *Tiraquell* of Nobility,
cap. 15. and *Pontus Heuterus* his Colle-
ction touching Bastards, you will find
that most of the Great Men of former
Times are in the Catalogue of famous
Bastards. Remember *Euripides* in his
Andromache:

Νοβίς τε, says he, πολλοὶ γνησίων ἀμείνονες.

Englished:

Many Bastards are better than (a) Legitimates.

(a) Look into the 9th Chapr. of Judges, and you will read that there was more Wickedness in one Bastard than in 69 lawful Sons.

But let us return to this Extramatri-
monial Custom of the sitting of Illegi-
timates in the Throne of Supremacy,
and we shall find that there was after-
wards a Law enacted by the French,
That Bastards should not inherit the Crown
of France. This Custom in favour of
Bastardy was likewise banished out of
England, and other Countries of Europe,
as appears both by *Baker* and *Hayward*
in the Life of King *William* the First.
And for a close of this Section, let us
call to mind what the Learned *Hugo*
Grotius has written against the Succession
of Bastards in Royal Thrones; who tells
us, "That none should be admitted to

"succeed in the Royal Throne, but he Lib. 2. c. 7.
"that is born legitimate, because Natu-
"ral Sons are subject to be reproached,
"to whose Mother the Father did never
"vouchsafe the Honour of Marriage;
"and therefore of such there can be
"no certainty who was the Father.
"But in the Succession to Crowns, the
"People ought to have the greatest as-
D surance

The Law of Bastardy.

“ surance that in such a case can be
 “ given, to avoid Controversies : For
 “ which cause it was, that the *Mace-*
 “ *donians* preferred *Demetrius* the youn-
 “ ger Son to the Throne, rather than
 “ *Perseus* the elder, because he was born
 “ in lawful Wedlock.

SECT.

e
 w
 C
 b
 d

 B
 m
 g
 ag
 th
 no
 po
 de
 be
 &
 Bi
 M
 the
 the

SECT. V.

Bastards, how legitimated.

IN the *Code* and *Novels* of the most Cod. 5. 27.
August Emperour *Justinian*, it is N. 74. & 89.
evidenced, That to legitimate him that
was a Bastard, when there could no
Claim be made unto his Birth-right but
by Grace, among the *Romans* were sun-
dry ways.

1. The first was, If the Father of the Cod. 5. 27. 100
Bastard (they being both single persons) N. 74. c. 1.
married the Woman by whom he be- Cod. 4. 27. 14
got the Child, this subsequent Marri-
age did legitimate the Issue born before
the Espousals: *Quomodo* (says *Justinian*)
non est iniquissimum, ipsam stirpem secundæ
posteritatis priorem quasi injustam exclu-
dere: cum gratias agere fratribus suis de-
beant, quorum beneficio ipsi sunt justi filii
& nomen, & ordinem consecuti? For the
Birth of the first is often the cause of the
Marriage following. Upon which Text
the Lawyer *Dionysius Gothofredus* hath
these two Notes following:

The one is, *Author beneficii alteri conferendi ipso beneficio non est arcendus, sed adjuvandus potius*, Add. D. 27. I. 36. 1.

The other is this: *Hinc videtur defendi posse communis illa opinio, legitimatum per nuptias non tantum legitimum fieri, sed jus primogenituræ etiam consequi adversus fratres justis nuptiis susceptos.*

But this kind of Legitimation, of which we are now handling, is limited by some Doctors, that the Woman be before in *Concubinatu*, in *familia retenta*, that there be *indubitatus affectus*, *sicut in Uxore*, &c. as you may see in *Bartol. ad finem*, *D. de Concubinis*, & *Mysinger ad Instit. de Nuptiis*, & *Aliquando*.

Cod 5. 27. 11.
N. 74. c. 1, 2.
N. 117. c. 2.

2. The second way is, Where the Father of the Bastard did by his last Will and Testament, or by some publick Instrument attested by Witnesses, name him to be his Natural and Lawful Son, or simply his Son, without the Addition of any of these two words, *Base*, or *Natural*, and therewithal did make him his Heir; which could not be, but in such cases only where the Father had no other Natural and Lawful Child left alive.

3. The

N. 89, c. 9.

Cod. 5. 27. 3.

& 9.

3. The third way was, Where the Prince by his Rescript, or the Senate by their Decree, did do any one that credit as to grant them the favour of Legitimation; which was done, for the most part, in such Cases only where either the Father of the Child, or the Child himself offered himself to be attendant on the Court or Prince.

Note, It was in the Power of the *Roman* Emperours, by their Rescripts, not only to legitimate Bastards begotten in simple Fornication, or in Adultery, but also those that were begotten in Incestuous Marriages, &c. *D. 23. 2. 57. n. 139, & 154. Roland. a Valle 11. Conf. 61. n. 32. & Gothofredus ad D. 23. 2. 57.* But it may be here demanded, What Power has the Pope as to the point of Legitimation? The Doctors of *Sorbonne*, and some of the best Canonists, are ready to return an Answer; which is, That they peremptorily affirm, That the Pope cannot make Bastards capable to inherit the hereditary Lands of their Father; neither can give Power to constitute Successors or Heirs, or hold Offices, Dignities or Titles, without the Sovereign Princes Dispensation; to which the Imperial Laws agree, and is authentick in *England*,

George Buck's
History in vita
R. 1. p. 47, 48.
Edit. 1647.

as it is reported by a Learned and
Co. 4 Inst. f. 36. Eminent Judge, namely, Sir *Edward Coke*.

Hitherto of the sundry ways of Legitimation among the *Romans*, none whereof take place in this our Realm, but only that which is done by Parliament; which, as it may bastardize a Child that by Law is legitimate, *viz.* begotten by an Adulterer, the Husband being within the four Seas, so it can legitimate one that is illegitimate, and born before Marriage, and that either absolutely, or *secundum quid*, but not *simpliciter*. As, to take one Example among many.

Rot. Parl. 20. R.
3. M. 6.

John of Ghent, Duke of Lancaster, had by *Katherine Swinford* before Marriage four illegitimate Children, *viz.* *Henry*, *John*, *Thomas* and *Johan*; and because they were born at *Beaufort* in France, they were vulgarly called *Henry de Beaufort*, &c. At a Parliament holden 20 R. 2. the King was pleased by Charter, at the humble Request and Suit of the Duke their Father, to make these *Beauforts* not only legitimate, but also capable of Lands, Heritages, Titles, Honours, Offices, Dignities, &c. and the King, for the greater Authority thereof, craved the Allowance, and favourable Assent of the Lords and Com-

The Law of Bastardy.

39

Commons in Parliament, which was granted.

The Charter, as it is taken out of the Archives and Tower-Records, runs thus:

Charta Legitimationis Spuri-
orum Johannis Ducis Lan-
castriæ.

Richardus Dei Gratia, Rex Anglie, Francie, Dominus Hibernie, Charissimis Consanguineis nostris, Nobilibus Viris Johanni de Beaufort Militi, Henrico de B. Clerico, Thome de Beaufort Domicello, & Nobili Mulieri Johanne Beaufort Domicelle preclarissimi Patruis nostri Nobilis Viri Johannis Ducis Aquitanie, & Lancastrie, Germanis natis, & Ligeis nostris Salutem.

Nos pro honore, & meritis, &c. Avulculi nostri, pro arbitrato, & meritorum suorum intuitu vos, quia magno probitatis ingenio, ac

D 4

vite,

bite, ac morum honestate fulgetis, & ex regali estis prosapia, propagati, &c. hinc est quod Johannis, &c. Abulculi nostri genitoris vestri precibus inclinati vobis (cum (ut asseritur) defectum Natalium patimini) hujusmodi defectum, & ejusdem qualitates quascunque abolere presentes, vos haberi volumus, pro sufficientibus, ad quoscunque honores, dignitatis preeminencias, status, gradus & Officia publica, & privata, tam perpetua, quam temporalia atque judicialia, & nobilia, quibuscunque nominibus nuncupentur, etiam si, Ducatus, Principatus, Comitatus, Baronie vel alia feuda, fuerint, etiam si mediate vel immediate, a nobis dependeant, seu teneantur prefici, promoveri, eligi, assumi & admitti, illaque recipere pro inde libere, ac licite valeatis, ac si de legitimo thoro existeritis, quibuscunque statutis, seu consuetudinibus Regni nostri Anglie in contrarium editis, seu observatis que hic habemus pro totaliter expressis, nequaquam obstantibus, de plenitudine nostre regalis potestatis, & de Assensu Parliamenti

liamenti nostri tenore presentium
dispensamus, vosq; & quemlibet ve-
strum natalibus restitimus, & le-
gitimamus; Nono Die Feb. Anno
Regni 20 R. 2.

Here we find large Graces, Honours
and Privileges conferred upon those
Beauforts; for the King calls them
Consanguineos suos, and not only con-
firms their Legitimation, but makes
them (by the Plenitude of his Regal
Authority, and by the Help of the
Parliament) capable of *Baronies*, *Earl-*
doms, *Dukedoms* and *Principalities*; en-
ableth them for all Offices, publick and
private, temporary and perpetual; to
take hold of and enjoy Feuds, as well
Noble as other, all Lands and Signio-
ries Hereditary, as lawfully, firmly,
and rightfully, as if they had been
born in lawful Matrimony; but yet
confers no Title nor Interest in the
Crown, by Virtue of the Word *Princi-*
patus; for to reach that, there should
have been Words of a higher Intent,
Words of *Empire*, *Majesty* and *Sove-*
reignty; such as *Regni summa Potestas*,
Corona, *Sceptrum*, *Diadema*, *Purpura*,
Majestas, and the like; neither of these
nor any importing their Extent, being
in this Charter; so no Title to the
Crown

The Law of Bastardy.

Crown nor Sovereignty could pass to the *Beauforts* aforesaid: Besides, it is an Error now, to take *Principatus* for *Regnum*, or *Supremus Dominatus*, being the Word *Principatus* long before, and in the Age of King *Richard* the Second, also ever since, hath been restrained to the Estate of *Primo-genitus*, and Heir Apparent, not only of Kings, but also of Dukes and Marquisses, as well Feudal as Sovereign. Add hereto what the

Co. 4 Inst. f. 37. Oracle of the Law saith in relation to this Act of Parliament of Legitimation or Form of a Charter; "But what?" "That this Legitimation was not *simpliciter* but *secundum quid*; for they were legitimated, and made capable of all Dignities, except the *Royal Dignity*: So as this *Legitimation* extended not to make them, or their Posterities inheritable to the Crown, but to all other Dignities.

Besides the Legitimation in Parliament, we have no other way to legitimate Bastards; for of *Adoption*, *Arrogation*, or any other means to make Children Lawful, except Marriage (a) we have no Use here in *England*.

(a) *Smith's*
Tract de Rep.
Angl. lib. 3. c.

7. *Swinburn's* 4th Part, Sect. 15. f. 161. b. 162. a. Edition 1590.

It is true, *Bracton*, *Lib. 2. c. 29. N. 4.*
f. 63. b. tells us of a Legitimation or
Adoption of an Heir; But Sir *Edward* 2 *Inst. f. 97.*
Coke saith, that such a way is fruitless,
and to no Purpose; and that the surest
Adoption of an Heir is by learned Ad-
vice, to make good Assurance of the
Land, &c.

SECT.

S E C T. VI.

How the Common-Law differs from the Civil and Canon-Laws in Point of Legitimation by subsequent Marriage.

Fortescue c. 39.

Naturalis ex
soluto genitus,
& soluta legi-
timatur per sub-
sequens paren-
tum conjugium,
etiam quo ad
hæreditatem.
Greg. Decrer.
Lib. 4. Tit.
17. c. 1.

THE Civil, or Imperial Law doth legitimate the Child born before Matrimony, as well as that which is born after, and giveth unto it Succession in the Parents Inheritance; And the Canon-Law concurs with the Civil-Law in the same Point; as appears by the Constitution of Pope *Alexander the Third* (that lived in the Year of our Lord God 1160. which was *Anno 6 H. 2.*) which is this, *That Children born before Solemnization of Matrimony, where Matrimony followed, should be as legitimate to inherit unto their Ancestors, as those that were born after Matrimony.* Co. 2. Inst. fol. 97. and Terms of Law, f. 41. b. Tit. *Bastard.*

But

But now otherwise it is in the Law of *England*, which alloweth no Succession or Inheritance to the Child born out of Matrimony, affirming it to be natural only, and not lawful.

c. 19. Fleta l. 6. c. 38. n. 1. Terms of Law, fol. 41. Glanvil. lib. 7. c. 15. Merton c. 9.

Fortescue c. 39.
Com. Ells. Inst.
L. 1. Tit. 9.
n. 17.
Brafton L. 5.
Tract. 5. de
Exceptionibus,
b. Tit. Bastard.

This Legitimation by subsequent Marriage was a thing anciently pressed by the Clergy of this Realm, to be admitted in like sort as it is used in other Countries, where the Canon or Ecclesiastical Law taketh place; but it was absolutely rejected by the People of *England* in the High Court of Parliament. And this appeareth by the Statute of *Merton*, made in the Twentieth Year of King *Henry* the Third.

Stat. of Merton
c. 9. or 20 H.
3. c. 9.

“ To the King’s Writ of Bastardy,
“ Whether one being born before Ma-
“ trimony may inherit in like manner
“ as he that is born after Matrimony,
“ all the Bishops answered, That they
“ would not, nor could not answer to
“ it: Because it was directly against
“ the common Order of the Church.
“ And all the Bishops instanted the
“ Lords that they would consent, That
“ all such as were born before Matri-
“ mony

The Law of Bastardy.

“mony should be Legitimate, as well
 “as they that are born within Matri-
 “mony, as to the Succession of Inheri-
 “tance; for so much as the Church ac-
 “cepteth such for legitimate. And all
 “the Earls and Barons with one Voice
 “answered, *That they would not change*
 “*the Laws of the Realm, which hitherto*
 “*have been used and approved.*

Which Noble, Couragious and Heroick answer has been often mentioned by the Lawyers, as *Bracton* Lib. 5. Tract. 5. *de Except. c. 19. N. 1. in Fin. Co. Lit. 245. a. Dr. Duck de Auth. Jur. Civil. Rom. lib. 2. pars 3. c. 8. n. 4. Davis Rep. 70. b. Le Case de Commendam, Ridley's View* Part 3, 4. Sect. 2. *Co. Lit. 5. Cawdries Case, and Swinburn* in his Tract of Wills 4 Part, Sect. 15. f. 161. b. Edit. 1590.

Sir *Edward Coke* upon this Answer hath this Note, That the Nobility of *England* have ever had the Laws of *England* in great Estimation and Reverence, as their best Birth-right; and so have the King's of *England*, as their principal Royalty and Right belonging to their Crown and Dignity. This made our King *Henry the First* to write to Pope *Paschal*, *Notum habeat Sanctitas*

*Etitas vestra, quod me vivente (auxiliante Deo) Dignitates & usus Regni nostri Angliæ non imminuentur, & si ego (quod absit) in tanta me * dejectione ponerem Magna-tes mei, imo totius Angliæ populus id nullo pateretur.*

* In Davy's Reports f. 90. it is directed.

SECT.

SECT. VII.

To what Jurisdiction the Tryal of Bastardy belongs.

THAT we may the better understand the extent of the Jurisdictions of the King's Courts, both Spiritual and Temporal, as to the Trial of Legitimacy and Bastardy, it is necessary that I offer these Particulars following:

I. *The Two Sorts of Bastardy according to the Common-Law.*

II. *The Honour and Reverence that is given by our Law to Bishops.*

III. *The Force and validity of the Bishop's Certificate at the Common-Law.*

IV. *What*

IV. *What is required to be done before a Writ be awarded to Certify.*

V. *The Rules that must be observed in the Course of Trial, in the point of Legitimacy and Bastardy.*

First, Of the Two Sorts of Bastardy, according to the Common-Law.

Though all the Cases of Bastardy in other Countries are triable by the Ecclesiastical Law, yet here in *England* it is not so in all Cases; and therefore the Common-Lawyers make Two sorts of Bastardy; the one general, the other special.

I. General Bastardy is so called by them, for that it comes in incidently, and is in gross objected against one that sues in a matter principal, to disappoint his Suit; which Suit is sent by the King's Writ to the Ordinary, with certain Additions for more Perspicuity of the Inquiry thereof; As that *Whether*

E

he

The Law of Bastardy.

he that is charged with the Bastardy, or Illegitimacy, were born in lawful Wedlock? Or, Whether he was born before his Father and Mother were lawfully contracted together in Matrimony, or after?

2. Special Bastardy, our Common Lawyers say, Is that where the Marriage is confessed, but the Priority or Posteriority of the Nativity of him whose Birth is in question, is controverted; wherein the Plaintiff pleads in this wise, *Thou art a Bastard, for that thou wast born before thy Parents were lawfully contracted together in Marriage, or before their Marriage was solemnized in Facie Ecclesiæ, in the Face of the Church.* To which the Defendant does return this Answer: *I am no Bastard, for that I was born in lawful Matrimony; Or, That I was born after that my Father and Mother were lawfully married together.*

Having given both a Description of, and diversity between these two sorts of Bastardy; I must now demonstrate to what Jurisdiction each of them belongs, and that shall be done by Proofs extracted out of the Books of Law.

Expofition of
Terms of the
Law, f. 41. b.
Tit. Bastardy.

By the Law of the Romish Church, if one get a Child upon a Woman, which Child is born out of Wedlock,
and

The Law of Bastardy.

51

and after he marry the same Woman, then such Child shall be said *Mulier*, and not *Bastard*. But by the Law of England he is a *Bastard*; and for that Cause, when such Special Bastardy is alledged, it shall be tried by the Country and not by the Bishop. But general Bastardy alledged, shall be tried by the Certificate of the Bishop.

Ever since the Bishops pleaded, That Co. 2 Inst. f. 99; they could not answer to the Writ of Bastardy, (as 'tis said in the Statute of 20 H. 3. c. 9.) Special Bastardy hath been tried in the King's Courts at Common-Law, and General Bastardy in the Bishop's Court.

Proponi solet (saith Fleta) Bastardia aliquando cum adjectione Cause quare Bastardus, & aliquando sine. Sed quia in tali responsione Episcoporum inveniebatur multotiens obscuritas, & incertitudo propter Causam non adjectam provisum fuit, quod in casu objectionis Bastardiæ præcise exprimeretur Causa, vel pro indefenso haberetur Exceptor. Causæ quidem sunt plures; ut si Pater petentis nunquam desponsavit Matrem ejus, vel si Matrimonium inter Patrem & Matrem ejus contractum fuit illegitimum, quia aliam Uxorem habuit legitimam tempore Contractus secundæ superstitem. Et in istis duobus Casibus non ha-

Fleta de Bastardia lib. 6. cap. 39. n. 2, 3, 4.

The Law of Bastardy.

bet *Judex secularis* *Cognitionem* quia ad ipsum non pertinet discussio utrum fuit ibi *Matrimonium* vel non, nec quæ *Mulier* fuit *Uxor* sua legitima, & quæ non. Sunt etiam aliæ *Causæ Bastardiæ*, quarum *Cognitio* ad *Curiam Christianitatis* non est demandanda, ut si tenens excipiendo dicat petentem nihil *Furis* habere, quia *Bastardus* pro eo quod natus fuit antequam *Pater* suus *Matrem* suam desponsavit, vel si dicat quod *Bastardus* sit, quia ab alio quam a *Viro* *Matris* suæ progenitus, & si petens dicat contrarium, licite poterit *Iustic.* per *Patriam* inde inquiren^r veritatem, si partes ad hoc mutuum præbuerint *Consensum*, & si tenens voluerit indefensus impune debet remanere, & si petens ad hoc assensum præbere voluerit, deneganda erit ei actio, & similiter si dicat quod legitimus sit, & hoc paratus sit probare quando & ubi debet, nisi tenentem contradicat expresse dicendo quod natus in sponsalibus, & nihil pertinet ad *Ordinarium* de prioritate vel posterioritate, inquirere *nativitatis*, non magis quam de temporis *præscriptione* si inde habeatur contentio, &c. Hæc quidem *Constitutio* provisæ fuit pro contrarietate *Legum* & *Canonum*, quia quicumque nati sunt ante *Matrimonium*, dum tamen *matrimonium* consequatur inter *Patrem* & *Matrem*, quoad gradus promotionis ad *Ecclesiasticam dignitatem* secundum *Canonem* legitimi reputantur, quoad vero in bona paterna secundum consuetudinem

Angliæ

Angliæ illegitimi, & Bastardi. Hitherto the very Words of *Fleta*.

Special Bastardy shall always be tried *Er. Bastardy,*
per Patriam, and General Bastardy by 38 E. 3. 39.
the Bishop's Certificate.

Cowell making mention of Bastardy Special and General, takes this difference between them; Bastardy General is a Certificate from the Bishop of the Diocese to the King's Justices, after just Enquiry made, that the Party enquired of is a Bastard, or not a Bastard, upon some Question of Inheritance. Bastardy Special is a Suit commenced in the King's Court, against him that calleth another Bastard: So termed (as it seemeth) because Bastardy is the principal and especial Case in Trial, and no Inheritance contended for.

Cowell's Interpretet Verbo Bastardy.

In an Action upon the Case for calling one Bastard, the Defendant justified that he was a Bastard; and it was awarded that this should be tried *per Pais*, and not by the Ordinary.

Hobart f. 179

E. 3 Secondly,

Secondly, *The Honour and Reverence that is given by our Law to Bishops for the Certifying Bastardy.*

Co. Lit. 134. a, b. It is to be known, that none but the
 Co. 2. Inst. f. 30. King's Courts of Record, as the Court
 & 325. Co. 4 of Common Pleas, the King's Bench,
 Inst. f. 100. Justices of Gaol-Delivery, and the like,
 Woman's Law. can write to the Bishop to certify Ba-
 yer lib. 4. sect. 8. stardy, Mulierty, Loyalty of Matri-
 f. 256. mony, and the like Ecclesiastical Mat-
 Braff. l. 3. Tract. ters; for it is a Rule in Law, That
 I. c. 7. N. 3. none but the King can write to the Bishop
 Britton c. 104. to certify; and therefore no inferior
 f. 248. b. Court, as London, Norwich, York, or
 Fleta lib. 5. c. 35. N. 1. any other Corporation, can write to
 the Bishop: But in those Cases the
 Plea must be removed into the Court of
 Common Pleas, and that Court must
 write to the Bishop, and then remand
 the Record again. And this was done
 in respect of the Honour and Reverence
 which the Law gave to the Bishop, be-
 ing an Ecclesiastical Judge, and a Lord
 of Parliament, by reason of the Barony
 which every Bishop hath. And this
 was the reason a *Quare Impedit* did lie of
 a Church in *Wales* in the County next
 adjoining, for that the Lordship's Mar-
 chers

The Law of Bastardy.

55

chers could not write to the Bishop; neither shall Conufance be granted in a *Quare Impedit*, because the inferior Court cannot write to the Bishop.

Thirdly, *The Force and Validity of the Bishop's Certificate at the Common-Law.*

In all the Reign of *Henry* the Third and his Progenitors, Kings of *England*, if any Issue were joined upon Loyalty of Marriage, General Bastardy, or such like, the King did ever write to the Bishop of the Diocess, as his Officer and Minister of his Ecclesiastical Court, to certify the Loyalty of the Marriage, Bastardy, or such like; And so the Course has continued through all the Reigns of our Kings to this Day.

Qui Filij (saith Cowell) ex justo Matrimonio nascuntur, qui ex coitu illicito, Episcopus loci dijudicat secundum Canones, & Statuta Regni; & de hoc Regem, quando-cunque exigitur, vel Justiciarios suos, certiores reddit. So that the Bilhop, by his own Ordinary and Pastoral Authority, makes Enquiry of the Legitimacy or Illegitimacy of the Person; and as he

Lib. 1. Tit. 9.
Epif. N. 6.

The Law of Bastardy.

finds the Truth of the Matter by due Examination to be this or that, so he pronounceth for the same in his own Consistory, and makes Certificate thereupon to the King's Court accordingly, and as he pronounceth, so the temporal Judges follow his Sentence in their Judgments, either for or against the Inheritance that is in Question. And that the Judges are obliged so to do, is evidenced by our Law Resolutions: as Co. lib. 4. f. 29. *Bunting and Lepingwell's Case*, Co. lib. 7. *Kenn's Case*, 34 H. 6. 14. 11 H. 7. 9. Cro. Car. 352. *Wickham versus Enfield*.

*Fourthly, What is to be done
before a Writ be awarded to
the Bishop to certify Bastardy.*

By the Statute of the 9th of H. 6. 9 H. 6. c. 11. no Writ shall be awarded to the Ordinary to certify Bastardy, before Three Proclamations be made in Chancery in Three Months, viz. One every Month; that all Persons who have any Thing to object against the Party for Bastardy, shall sue to the Ordinary for that Purpose.

Fifthly,

Fifthly, The Rules that are to be observed in the Course of the Trial of Legitimacy and Bastardy.

1. The King of England, that is, and always was of very Right, the Fountain of all Justice and Jurisdiction, as well Ecclesiastical as Civil, within his own Dominions and Territories, [*Ridley's View of the Civil and Ecclesiastical Law*, part 3. c. 1. sect. 1. pag. 165. edit. 175. *Davis's Reports*, fol. 51. b. f. 97. b. *Co. Lit.* b. 9. f. 38. a. *Hensloe's Case*, *Hobart's Reports* f. 17. *Dr. James's Case*, 1 E. 6. c. 2. 24 H. 8. c. 12. *Co. Lit.* 5. *Cawdrie's Case*,] has, by the Rules of the Common Law, a Superintendency over the Proceedings of the Bishops, with Power of Direction when and how they shall proceed, and of restraint and Correction, if they act not duly, as it is manifested by the Writs of several Natures, directed to the Bishops, whereby the King commands them to certify *Bastardy*, *Excommunication*, *Profession*, *Accouplement* in lawful Matrimony, &c. As also by the Writs of *Prohibition*, *Consultation* and *Attachment upon Prohibition*.

2. The

2. The Question of Bastardy ought first to be moved in the Temporal Court, and Issue thereupon must be joined there; and it ought to be transmitted to the Ecclesiastical Court, by the King's Writ to be examined, and tried there, and thereupon the Bishop is to make a Certificate to the King's Court; to which Certificate, being made in such due form, the Law doth give such Credit, that all the World shall be bound and estopped by it.

3. If any Suit to prove Bastardy or Legitimacy be first commenced in the Ecclesiastical Court, before any Question be moved of such matter in the Temporal Court of the King, Prohibition lies: And if it be accompanied with ill Practices and Fraud, it is a Misdemeanor, punishable heretofore in the Star-Chamber Court; but now I suppose it may be punished in the King's Bench.

32 E. 4. *Fitzh.* To this purpose the Case of Sir Robert
 Consultation 6. *Corbet* may be put; He had Issue, two
 Sons, *Robert* and *Roger*; *Robert* the Son
 being within the Age of Fourteen
 Years, takes to Wife *Matild*, with
 whom at his full Age he co-habits, and
 were known and reputed openly for
 Man

Man and Wife; yet afterwards *Robert* the Son puts away the said *Matild*, and living the said *Matild*, marries one *Lettice*, and having Issue a Son by this *Lettice*, dies; after whose Death *Lettice* publisheth and declares openly, That she was the Lawful Wife of *Robert*, and that his Son was *Mulier*, and Legitimate. Upon which, *Roger* (the younger Son of Sir *Robert Corbet*) commenceth a Suit in the Spiritual Court, to reverse and annull the Espousals between *Lettice* and *Robert*, and to put *Lettice* to Silence, &c. Whereupon *Lettice* obtains a Prohibition, and upon this *Roger* shews all this matter, and prays a Consultation, which was denied him, and that for this Reason principally, viz. That the Intent of the Suit in the Spiritual Court was to Bastardize the Issue between *Lettice* and *Robert*, and to prove *Roger* Heir to *Robert*; and the Action and Original to bastard a Man shall not first be moved in the Spiritual Court, but in the Temporal Court, &c. And to make this point more clear, there is a Case put by *Bracton*, which is thus: *B.* having Issue of the Body of his Feme an Inheritrix before Espousals, by Colour whereof he claimed to be Tenant by the Courtesy: But being for this Cause barred in an Affize brought by him against

Lib. 3. Tract.
5. de Exceptio-
nibus, cap. 6.
num. 1. f. 404. b.
405. a.

against *A.* he obtained a Bull of the Pope, and by Virtue thereof he began a Suit in the Ecclesiastical Court, to prove his Issue Legitimate, *quod facere non debuit*, as *Bracton* there said: and for this a Prohibition was granted to stay this Suit, shewing all the Matter; “Et
 “quod prædictus *B.* ad deceptionem
 “Curia nostra, & ad in firmandum
 “judicium in Curia nostra factum,
 “trahit ipsum *A.* in placito coram vo-
 “bis, in Curia Christianitatis, Autho-
 “ritate Literarum Domini Papæ, ad
 “prædictum puerum legitimandum, &c.
 “Et cum possint Judices aliqui de le-
 “gitimitate cognoscere quoad hæ-
 “reditatem, & successionem habenden-
 “dam, nisi fuerit loquela prius in Cu-
 “ria nostra incepta per breve, & ibi
 “Bastardia objecta & postea ad Cu-
 “riam Christianitatis transmissa vobis
 “prohibemus, quod in Placito illo ul-
 “terius non procedatis, &c.

3. As the Ecclesiastical Judge may not make Enquiry of Bastardy or Legitimation without special Direction and Commandment of the King; so when he has received the King's Writ to make this Enquiry, he ought not to surcease upon the account of any Appeal or Inhibition; but must always proceed till he has certified the Court of
 of

The Law of Bastardy.

61

of the King : And this is likewise ap-
parent in *Bracton* : “ Cum autem
“ *Judex Ecclesiasticus inquisitionem fe-* Lib. 5. Tract. 5.
“ *cerit, non erit ab eo appellandum ab* de Exceptioni-
“ *aliquo, nec a petente, nec a tenente :* bus, c. 19. n. 4.
“ *a petente, non quia talem Jurisdictionem,* f. 420. 2.
“ *& talem Jurisdictionem, & ta-*
“ *lem Judicem elegit : a tenente non,*
“ *quia sic posset Causam in infinitum*
“ *protrahere de Judice in Judicem*
“ *usque ad Papam, & sic posset Papæ*
“ *de Laico feodo indirecte cognoscere.*

To this same purpose let's cite a Case 39 E. 3. 20. 4.
to be found in the Year-Book of King
Edward the Third, where in a Writ of
Dower, *ne unques accouple en loyal Ma-*
trimony, was pleaded, and Issue there-
upon joined, upon which a Command
was sent to the Bishop to certify ; who
notified, That he could do nothing in
the point, by reason of an Inhibition,
that came to him out of the Arches.
This Return was held insufficient ; for
there it was said, That the Bishop ought
not to surcease from doing the King's
Command, maugre any Inhibition
whatsoever.

Having shewn what Rules are to be
observed in the Course or Practice for
the Trial of Legitimacy and Bastardy,
I will subjoin the true cause and reason
why

why the Ecclesiastical Judge is not to enquire of Legitimation or Bastardy, before he has received direction or command from the Temporal Court; and it is this: For that the Court-Christian had never any Power or Jurisdiction to intermeddle with temporal Inheritances, either directly or indirectly. For it was noted, that our Lord and Saviour Christ himself refused to meddle in a Cause of such Nature, when a Petition was made to him; *Master, speak to my Brother, that he divide the Inheritance with me.* And he answered, *Man, who made me a judge or divider over you?* And for this cause, in the time of H. 3. when the usurped Jurisdiction of the Bishop of Rome was elevated higher than ever before or since in the Dominions of the King of England, Pope Alexander the Third having granted a Commission to the Bishops of Winchester and Exeter to enquire of the lawful Nativity of Agatha, the Mother of one Robert de Ardenna, and if she were found legitimate, to restore the said Robert to the Possession of certain Lands, of which he was dispossessed; and being informed that the King of England was highly offended with this Commission, the said Pope Alexander immediately revoked and countermanded it in this point of Restitution

Luke 12. ver.
3. 4.

tution of Possession, acknowledging and confessing that the Establishment of Possessions doth belong to the King, and not to the Church. Which Case is reported in the Canon Law, together with the Commission, and revocation thereof; as you may see in *Decret. Greg. lib. 4. tit. 17. Qui filij sint Legitimi. cap. 4. & cap. 7.*

SECT.

SECT. VIII.

Bastardy happening subsequent to Matrimony, upon Divorce.

BEfore I speak of such Divorces as will Bastardize the Issue, it will not, I think, be impertinent to demonstrate,

I. Divorce, why so called.

II. The Manners or Kinds of Divorcement among the Old Romans.

III. Divorce what, or how defined.

IV. The several Causes of Divorcement.

I. Divorce, why so called.

It is so called of the Diversity of the Minds of those that are married, because such as are divorced go one a divers

vers way from the other. *Divortium*, says the Lawyer *Gaius*, *vel a diversitate* D. 24. 2. 2. *mentium dictum est, vel quia in diversas partes eunt, qui distrabunt Matrimonium*. And another Lawyer, namely, *Paulus*, tells us, that *Divortium ex eo dictum est*, D. 50. 16. 191. *quod in diversas partes eunt, qui discedunt*. But others would have it derived from the Verb *Diverto*, which signifieth to *Terms of Law*, return back; because that after the *Di- f. 123. a. sec.* vorce between the Husband and Wife, *Divorce*. he returneth her again to her Father or other Friends, or to the Place from whence he had her.

II. The Manners or Kinds of Divorcements among the Romans.

There were Two manner of Divorcements used among the ancient *Romans*; *Rosin. Antiq. lib. 5. c. 38.* The One between Parties only contracted, the Second between Parties married. The first was properly called *Repudium*, in which the Party suing for Divorcement used this Form of Words, *Conditione tua non utor*. D. 24. 2. 2. 2. *Goodwin Antiq. lib. 2. sect. 2. c. 20. p. 75, 76.* *Th. Dempster, lib. 5. Antiq. Rom. c. 38.*

The Second was called *Divortium*, wherein the Party suing for it used these Words, *Res tuas tibi habeto; vel, Res tuas tibi agito*. D. 24. 2. 2. 1. Both these Kinds were termed, *Matrimonij Renun-*
F *tiationes*;

tiationes, Renouncing or Refusal of Marriage. Where it is to be noted, that instead of this Verb *Renunciare*, divers good Authors do use this Phrase, *Mittere*, or *Remittere Nuncium*; as *Cæsar Pompeiæ nuncium remisit*; *Cæsar* hath divorced *Pompeia*. The Reason why in Matrimonial Contracts, it signified to renounce or refuse, was because in these Divorces they did oftentimes send to their Wife *per Nuncium*, by a Messenger, some Bill or Scroll of Paper, containing the Causes of Divorce. Moreover, 'tis to be observed, that in these Divorces the Ceremonies were quite contrary to those they used in their Marriages; The just Causes of Divorce being fore-signified to the *Roman* Censors, the Marriage Tables were broken, the Dowry restored, the Keys of the House taken from the Woman, and she turned out of Doors.

III. Divorce what, or how defined.

By the Canonists Divorce is thus defined; *Divortium, est legitima mariti, & Uxoris separatio apud Competentem Judicem, cum cognitione, & sufficiente ejus probatione.*

Arx. Corvinus de jure can. L. 2. Tit. 17. Panorm. in ex conquestione 10. de restit. spoliat.

By which Definition it appears, that to make a Separation betwixt Husband and Wife, there must not only be sufficient Proof, but also there ought to be a competent Judge, before whom it is to be done; and this competent Judge is no other than the Bishop, who by his Ordinary, and Pastoral Authority, if there be Cause sufficient, can make such a Separation; He can by his Ordinary Jurisdiction (and no other besides him) not only undo the Sponsals of Future Marriage, but also make a Repudiation, when Matrimony is fully contracted, and consummated.

The Woman's Lawyer, lib. 2. sect. 9. & sect. 27. & lib. 3. sect. 30. p. 223.

IV. *The several Causes of Divorce.*

Albeit that Divorce was never approved of by the Divine Law, but contrariwise prohibited, as appeareth by this Precept, *Let no Man separate that which God hath joined together*; yet in all Ages, and well-governed Commonwealths it hath been used and permitted. And so at this day with us there are divers Causes for which the Husband and Wife may be divorced;

some whereof are precedent to the Marriage, and some subsequent to it. Where the Causes are precedent to Matrimony, there the *Vinculum* is dissoluble; as if one marries another Man's Wife; or a Husband, his Wife living, marries another; or if the Parties contracting, or marrying be within the Degrees forbidden by God; or if either Party were pre-contracted, or frigid, or *infra annos Nubiles*. But where the Cause is subsequent to the Matrimony, there the Bond of Matrimony cannot be dissolved, but only a Divorce, upon just Cause grantable, to separate the Complainant *a Mensa & Thoro*, and so freeing the Parties from the Performance of Conjugal Duties the one with the other: And the Causes

Co. Lit. 235. a.

Co. 3 Inst. f. 89.

Cro. Car. f. 262.

Porter's Case.

The Woman's

Lawyer, lib. 3.

sect. 50.

Terms of Law,

f. 123. b. Tit.

Divorce.

Co. lib. 3. 98.

Burie's Case,

&c lib. 7. Kenn's

Case.

The Law of Bastardy.

69

Causes of this later Kind of Divorce are, Adultery, deadly Hatred one toward another, intolerable Cruelty, and the like: And the reason why in these Cases the *Vinculum Matrimonii* cannot be dissolved, is, Because Marriage being an Institution of God, it is in the Cause superior to any Humane Law or Act, and so by Consequence cannot by them be dissolved.

Hitherto I have declared, Divorce what, and why so called; as also the Causes of Divorce, precedent and subsequent to Matrimony; now I come to shew which of the Divorces precedent Marriage will Bastardize the Issue, and bar the Wife of Dower.

If a Man has a Wife in being, and marries another Woman, the second Marriage is void, and the Issue a Bastard. *Br. Bastardy*, 43. 18 E. 4. 28. Husband marrying the first Wife living.

If a Man marries a Wife, and living that Wife, marrieth another, and hath Issue by the second Wife, this Issue is a Bastard, notwithstanding that the first Wife after dies, and shall not take by Descent. 42 E. 3. 11. *Kitchin*. f. 214. *Tit. Descent*.

If a Man be divorced, and takes another Wife and dies, leaving Issue by the first Wife, this Issue may sue for the defeating of the Divorce, and bastardize the Issue of the second Wife, although the Baron, that was divorced, be dead. *Br. Bastardy*, 47. 12 H. 7. 22.

Pre-contract.

If a Man marry with a Woman pre-contracted, and hath Issue by her, this Issue in Law and Truth bears the Surname of his Father; but if after the Husband and Wife be divorced for the Pre-contract, there the Issue hath lost his Sur-name, and is become a Bastard, and *nullius Filius*. *Co. Lib. 6. f. 56.* Sir *Moyle Finch's Case*. *Terms of Law*, f. 123. b. *Tit. Divorce*.

By the Divorce *Causa præcontractus*, there is a nullity of the Marriage *ab initio*, and the Children between the Parties are meer Bastards. *Co. 2 Inst. f. 93.*

Consanguinity.

If a Man marry his Cousin *infra Gradus Maritagij*, who have Issue, and are divorced in their Lives, by that the Marriage is avoided, and the Issue is Bastard; contrary if one of them dies before the Divorce. 39 E.

3. 31. 24 H. 8. Br. Bastardy, 44. Kitchen, f. 214. Tit. Discent. Br. Darraignment, 11. The Woman's Lawyer, Lib. 3. Sect. 50. fol. 224. vide Fleta, l. 1. c. 14.

To what I have said before touching the several Causes of Divorce, some whereof in their Effects do bastardise the Issue, I shall subjoin some Learning about Frigidity and Impuberty; as also some Notes or Observations relating to Divorces, with which I shall conclude this Section.

I. Of Frigidity and Impuberty.

As to Impotency or disability of Pro-creation, take what follows: *Causa Frigiditatis.* Dyer, 2 Eliz. 179. saith, That Sentence of Divorce was given, *Causa Frigiditatis Naturalis*, in the Archbilhop's Court of Audience, and the Woman was *Actrix & querulans de impotentia procreandi in viro*, Who was declared impotent by the Physitians. The same, or next Year, another Case and Judgment happened like the former, and the Woman which complained married to a second Husband of greater Ability, by whom she had Children, and gave him all her Land by Fine, &c. her first Husband

Husband also was married to another Woman, and had Children by his second Wife; in which Case the Doctors held, that the Parties divorced were compellable to live again together, *ut Vir & Uxor, quia sancta Ecclesia decepta fuit in Judicio priori*. Therefore much a-do was made to stay the Engrossing of the Fine, yet the Justices made it to be engrossed, *contra mandatum Domini Custodis, &c.* But see, those Doctors aforesaid erred, and were much beside the Truth; as appears in Co. lib. 5. f. 98. *Burie's Case*, where 'tis held, That if a Man be married to a Woman, and after they are divorced *Causa Frigiditatis*, and then the Man takes another Wife and hath Issue by her, that this Issue is lawful, because that a Man may be *habilis & inhabilis diversis temporibus*, and by the Divorce *Causa Impotentiae*, the Marriage was dissolved *a Vinculo Matrimonij*, and by Consequence either of them may lawfully marry again.

The Emperour *Justinian* ordered, That in the Examination and Proof of Impotency and Disability of Procreation, there should be expected Three Years. *Novella Constitutio 22. c. 6.* [whereas before, the Expectation continued but Two Years; as *Cod. 5. 17. 10.*]

10.] But the Canons of the Church have since provided, that Matrimony is dissolved by Probation of Impotency, without mention or limitation of any time; and when 'tis said, that Frigidity or disability of Procreation dissolveth Marriage, avoiding it as it had never been; it must be understood of Impotency which was before the Marriage: For otherwise it is, when this Disability happeneth after Marriage had and solemnized: For in that Case, he or she that remaineth Potent, shall not leave and depart from the Impotent, but be compelled to bear that Inconvenience as well as any other ill Fortune; *Quid enim tam humanum est, quam ut fortuitis Casibus Mulieris maritum, vel Uxorem Viri Participem esse?* Says the Lawyer *Ulpian*, D. 24. 3. 22. 7. in *Fine*.

As to the Divorce upon the account *Causa Impubertatis*, or, *Minoris Ætatis*. of Impuberty, the Law of *England* runs thus:

If two are married *infra Annos Nubiles*, and after the full Age Divorce is had between them, this dissolveth the Marriage, and the Woman may arraign an Affize against the Husband for the Lands and Tenements given with her in Frank-Marriage. 19 *Lib Affiz*.
Pl. 2.

The Law of Bastardy.

Pl. 2. and Terms of Law, fol. 123. b.
Tit. *Divorce*.

If an Heir or other Body be married *infra Annos Nubiles*, and after does disassent at the Age of Discretion, or after, before Assent to the Marriage, it is sufficient, and the Party may be wedded to some other Body, without either Divorce, or Testimony of the Disagreement, before the Ordinary, who though he may, as Judge, punish *per Arbitrium Judicis*; yet the second Espousals are good by the Law of both Realm and Church, as it was declared by the Doctors of the Civil Law, 5 *Phil. & Mar. Br. Gard.* 124. *Crompton*, fol. 120. b. Tit. *Court of Wards*, and *The Womans Lawyer*, Lib. 3. Sect. 50. f. 223.

II. Notes

II. Notes or Observations relating to Divorces.

The Notes or Observations that I have met withal concerning Matters of Divorce, are such as these following :

1. That in the Sentence of Divorce it is requisite the Cause thereof be shewed ; and the Reason is, because some Divorces dissolve the Matrimony ; that is to say, *a Vinculo Matrimonij*, bastardize the Issue, and barreth the Wife of Dower. And some *a Mensa & Thoro* ; the which dissolveth not the Marriage, nor barreth the Wife of Dower, nor bastardizeth the Issue. Terms of Law, f. 124. a. Tit. *Divorce*, and Co. lib. 7. *Kenn's Case*, and The Womans Lawyer, lib. 3. sect. 50. f. 225.

2. That when Divorce is to be had for *Kindred*, *Precontract*, *Frigidity*, or such like Case, the Trial thereof, when it is pleaded in a Temporal Court, must be by Certificate of the Bishop, and not *per Patriam*. 5 H. 4. f. 2.

3. That

3. That so long as a Sentence of Divorce stands in Force, the Issue of the first Feme is a Bastard; because the Spiritual Court hath Jurisdiction thereof, and our Law giveth Credit unto it. *Co. Lib. 7. fol. 42. Kenn's Case.*

4. That though a Divorce cannot be had after the Death of the Parties, yet a Sentence of Divorce may be repealed, if there be Cause, after the Death of the Parties; but then this Reversal or Repeal must be in the Spiritual Court; for that the Divorce is a Judgment in that Court. *Co. Lib. 7. Kenn's Case.*

5. That a Sentence of Divorce against the Wife binds the Husband, though not Party. *Co. Lib. 4. fol. 29. Bunting's Case.*

6. That seeing the Right and Lawfulness of Marriage is ever to be judged, not by the Temporal, but by the Spiritual Judge, 13 and 14 *Eliz. Dyer fol. 305.* they which are married ought in no case to sever themselves, and re-marry, without the Spiritual Judge; if they do, the second Marriage is no Marriage, the Children had in it are illegitimate.

The Law of Bastardy.

77

illegitimate, and the Woman not dowable, except in the Case of Immaturity before specified. The Womans Lawyer, Lib. 3. sect. 50. f. 224.

7. That generally where Espousals are not meerly void, but defeasible, if they be not avoided by Divorcement, the Issue that is had without defeating that, shall inherit, as in the Case of one marrying within the Degrees prohibited by the Levitical Law. The Woman's Lawyer, Lib. 3. Sect. 50. fol. 224.

8. That if a Divorce be had between a Man and his Wife, *Causa Præcontractus*, or other Cause, the Parties being dead between whom it was, the Courts at *Westminster* cannot now examine it, to prove another Heir against that Sentence. *Cro. Jac.* f. 186. *Robertson vers. Lady Stallage*.

9. That a Release by the Baron, of a Legacy to the Feme, after a Divorce, *Causa Adulterij*, is good to extinguish it. *Cro. Eliz.* fol. 908. *Stephens versus Totty*.

10. That

10. That if a Lease be made to the Husband and Wife during the Coverture, and the Husband sowerth the Land, and then they are divorced *Causa Præcontractus*, the Husband shall have the Embleaments, and not the Lessor. *Cro. Eliz.* f. 461. pl. 10. *Oland* versus *Burdwick*, *Co. Lib.* 5. *Oland's Case*, *Terms of Law*, f. 124. *Verbo Divorce*, and *Womans Lawyer*, *Lib.* 3. *Seçt.* 50. f. 226.

Minshien 239.
Cowell's Inter-
preter *Verbo*
Divorce.

11. That upon a Nullity of a Marriage through some essential Impediment, as *Consanguinity*, or *Affinity* within the Degrees forbidden, *Præcontract*, *Impotency*, or such like, the Woman so divorced receives all again that she brought with her.

Examples will prove and illustrate this Observation in respect both of Goods and Lands.

I. *In respect of Goods.*

If Goods be given in Marriage with a Woman, she shall recover them in the Spiritual Court after Divorce, and there lieth no Prohibition. 16 H. 8. 7.

It is agreed in *Dyer*, That the Woman shall have the Goods not spent; and that Detinue lies for them, *Dyer* 28 H. 8. 12.

If a Man who is bound to a Woman by Obligation marry her, and they be divorced, she hath her Action again, which was suspended. But it may be demanded, *Whether she shall have, after the Divorce, those Goods that the Baron has before given or sold?* It is answered, That if the Husband before the Divorce have given or sold without Fraud, such Goods as were the Wife's before Marriage, she is without Remedy for them, being divorced: But if he aliened them by Fraud, she shall have a Writ of Detinue for so much of them as the Property may be discerned of; and for the residue, Money, and such like, she shall sue in the Spiritual Court. The Womans Lawyer, Lib. 3. sect. 50. f. 226.

II. *In respect of Lands.*

It's held for Law, that if the Woman divorced be an Inheritrix, &c. and the Husband before divorcement hath done Waste, felled her Woods, received her Rents, granted her Wards, presented to her Churches, given away her Goods, none of these things past in Possession executed, can be reversed or recalled; but if the Inheritance itself were discontinued, or charged, or a Release made of it, or her Villains manumitted, and the like, she shall have remedy for these things by the Common-Law. *Br. Dereignment, 18.*

So if Baron and Feme, Joint-Purchasers, be disseized, and the Baron release, &c. the Wife shall have a Moyety, if they be divorced, although before there were no Moyeties betwixt them; for the Divorce converteth that into Moyeties. *Br. Dereignment, 18.*

So a Gift in Frank-Marriage (within the Years of Marriage) with a Daughter, and they were divorced at full Age, at the Suit of the Husband; yet the Daughter shall have all, for she was the Cause of the Gift. 19 *Affize 2.*
19 E.

19. E. 3. Tit. *Affize*. 18. *Kitchin* f. 310.
Tit. *Tenant in Frank-Marriage*.

So if a Man be seized of certain Tenements, and infeoffs his Feoffer, and his Wife in Tail, the Remainder to the right Heirs of the Baron, they were divorced at the Suit of her Husband, which kept the Woman out of the Lands, and she brought an Affize, whereby she recovered a Moiety of the Tenements by Judgment presently. And *propter Difficultatem* it was adjourned for the other Moyety to the Common Pleas, where she had Judgment of that also; because Divorce was at the Husband's Suit. Tit. *Affize* in *Fitz.* pl. 413, 443.

And it is to be noted, that as a Woman may have an Affize against her Husband divorced, for Lands wherein she claimeth Inheritance, or Estate for Life; so if he have aliened in Fee, Fee-Tail, or for Life, the Lands which he had in Fee-Simple, Fee-Tail, or for Term of Life, to a Stranger; she may, as soon as she is divorced, bring a Writ called a *Cui ante Divortium*, against the Alienee; and this Writ may be in the *per cui & post*; and if she die before Action commenced, or before Recovery, her Heir may have a Writ called a *Sur*

The Law of Bastardy.

cui ante Divortium, and the Aunt and Niece may Join in in it. But for her Estate Tail her Heir shall be put to a *Formedon*. The Womans Lawyer, lib. 3. sect. 50. f. 228.

Hitherto of Bastardy that happens subsequent to Matrimony upon Divorce: I come now to treat of other Cases, wherein Issue born within the Bonds of Wedlock may be reputed a Bastard.

SECT.

SECT. IX.

In what Cases Issue born within Marriage shall be reputed a Bastard, and in what not.

IT is generally held for a Rule (both among the Common Lawyers and Civilians) *That he is the Father, whom Wedlock declareth.* *D. 1. 6. 6. D. 2. 4. 4.* *5. Cod. 4. 19. 14. Bracton. lib. 1. c. 9. n. 4. & lib. 2. c. 32. n. 5. Fleta lib. 1. c. 6. & lib. 1. c. 14.* *Pater est, quem Nuptiæ demonstrant.*

Upon this same Rule the Common Lawyers have pronounced, *That if a Man be within the Four Seas, and his Wife bath a Child, they presume that it is the Child of the Husband; and against this Presumption they will admit no Proof:* Hence in favour of Matrimony, and for the Benefit of Children, these following Cases are held to be good Law in our Books.

If a Man take to Wife a Woman great with Child by another that was not her Husband, and after the Child is

G 2

born

The Law of Bastardy.

Tit. *Bastard.* born within Espousals or Marriage;
 Bract. l. 2. c. 29. he which marries the Woman shall be
 n. 4. Fitz. Atr. said to be the Father of the Child, and
 Tit. *Bastardy,* not he which did beget the same, al-
 n. 1. 4. Br. *Ba-* though the Child be born the next day
stardy 43. after the Marriage; for *whose is the*
Cow, as it is commonly said, *his is the*
Calf also. Vide Smith's Tract. de Repub.
 Angl. lib. 3. c. 6. & Swinburn 4 part.
 sect. 15. f. 162. a.

1 H. 6. 3. If the Wife of *V. S.* go away with an
 4 E. 3. 11. Adulterer, and hath Issue; if *J. S.*
 7 H. 4. 9. her Husband, be within the four Seas,
 Kitchin. f. 213. the Issue is the Heir of *J. S.* for by
 Tit. *Descent.* whom the Woman is with Child it can-
 Womans Law- not be tried; and for that it shall be
 yer, lib. 4. sect. intended to be begotten by *J. S.* him-
 36. f. 328. self.

If I marry the Widow of one lately
 Sir Tho. Smith dead, which at the time of the Hus-
 in his Tract. de band's death was with Child, and the
 Rep. Angl. f. 104 Child is born after Marriage solemn-
 Kitchins f. 213. ized with me, this Child shall be mine
 Tit. *Descent.* Heir, and lawful Son. But here some
 Common Lawyers do distinguish be-
 Terms of Law, twixt *Grossément Enseint* and *Privément*
 f. 41. b. Verbo *Enseint*: For if she were *Privily* with
Bastard. Child at the time of the first Husband's
 Cowell's Inst. Death, then it shall be reputed the
 lib. 1. tit. 9. Child of the second Husband. But
 sect. 7. if great with Child by her first Husband
 and

and then takes another Husband, and then the Child is born, this Child shall be taken to be the Child of the Former Husband.

Sir *Edward Coke* in his Comment upon *Littleton*, fol. 8. a. saith, If a Man hath a Wife, and dieth, and within a very short time after, the Wife marrieth again, and within nine Months hath a Child; so as it may be the Child of the one or the other; some have said in this case the Child may choose his Father, *Quia in hoc Casu, Filiatio non potest probari*; and so is the Book to be intended: For avoiding of which Question and other Inconveniencies, this was the Law before the Conquest, *Sit omnis Vidua sine marito duodecim mensibus, & si maritaverit perdat dotem. Vide Lambard's Achainomia*, f. 123. Lex 71. Inter *Leges Canuti*.

Hitherto of the Common Law; let's now see how the Civil Law runs in favour of holy Matrimony, and in making good the before-mentioned Rule, *viz. Pater est quem Nuptiæ demonstrant*.

The Civilians do assert, That if after the Marriage solemnized, one has Carnal Conjunction with another Man's

D. 1. 6. 6. Wife, the Husband is presumed to have
 D. 48. 5. 11. begotten the Child himself, and not
 9 Swin. 4 part the Adulterer, albeit another had to
 sect. 15. n. 6. do with her besides her Husband;
 which Assertion of theirs is accom-
 panied with some further Remarks and
 Explanations.

(1.) Although the Mother do coha-
 (a) Bald. in L. bit with the Adulterer, yet if the Hus-
 fi a matre C. band have Access unto her, he is pre-
 de suis & legit. sumed to be the Father, and not the
 Mascard. de pro- Adulterer (a). For albeit it be likely
 bar. Verbo Fi- that the Adulterer did beget the Child,
 lius, sect 78. yet seeing it is possible that the Hus-
 Bald. in L. Fi- band did beget it: *Honest Possibility is*
 lium de his qui *preferred before that other Possibility that is*
 suis vel alien. *accompanied with Dishonesty.*
 jur.

Mascard. de 2. Albeit the Wife were as common
 probac. verbo as the Cart-way, making open Profes-
 filius concl. 788 sion of her Filthiness; yet the Husband,
 n. 39. if she be not altogether out of his
 Guard, shall be adjudged the only
 Father.

Alciatus de præ- (3.) Albeit the Mother had been
 sump. Reg. 3. barren a long time before, yet the
 præsump. 37. Child is presumed to have been begot-
 ten by the Husband, and not by the A-
 dulterer.

(4.) Al-

(4.) Albeit the Mother do confess that the Adulterer did beget the Child, yet her sole Confession doth not hurt the Child.

D. 22. 3. 29.
Palæotus de
Nothis & Spur.
c. 24. n. 2.

From these Extensions of the Roman Jurisconsults, let's now shew what Limitations are annexed by the Common Lawyers, as also by the Civilians, to the former Rule, *scil. He is the Father whom Wedlock declareth,*

I. Of the Limitations at Common Law.

Our Lawyers have annexed to the pre-mentioned general Rule these Restrictions or Limitations which here follow :

1. The first Limitation is this ; When the Husband was not within the Four Seas, (that is, within the Jurisdiction of the King of *England*) at such time as the Child was conceived, or at the least was so far absent from his Wife, or imprisoned at the same time, that thereby it was impossible for him to have begotten the same Child, such

*Præsumitur quis (satis Bra-
con) esse filius
hoc ipso quod
nascitur ex Ux-
ore, quia Nu-
ptiæ probant
Filiū esse, &
semper stabitur
huic præsum-
ptionis donec*

probetur con-
trarium : ut
ecce, maritus
probatum non
Concubuisse a-
liquam diu cum
Uxore vel alia

causa impeditus
probatum quod
fuit absens per decennium & reversus invenit annicu-
lum, hic qui in
Filius Mariti.

Child is by the Common Law a Ba-
stard. *Bract.* lib. 1. c. 9. n. 4. in fine &
lib. 2. c. 29. n. 4. f. 63. b. *Br. Bastardy*
4. *Kitchen* f. 213. Tit. *Descent.* Edit.
1651. *Fleta* lib. 1. c. 15.

vel erat in ea invalitudine ut generare non possit, vel
fuit absens per decennium & reversus invenit annicu-
domo mariti natus est (licet vicinis scientibus) non erit
Lib. 1. c. 9. n. 4.

2. The *Second* is, If the Husband by
reason of grievous Sickness could not
lie with his Wife, or were disabled
from getting a Child at such time as his
wife conceived, he is not to be deemed
the Father of that Child ; and therefore
such Issue is a Bastard. *Bracton* lib. 1.
c. 9. n. 4. & lib. 2. c. 29. n. 4. f. 63. b.
Fleta lib. 1. cap. 15. n. 4.

3. The third is, If the Husband hath
an apparent Impossibility of Procrea-
tion, as if the Husband be but eight
Years old, or under the Age of Procrea-
tion, such Issue is a Bastard, albeit he
be born within Marriage. *Co. Lit.* f.
244. a.

4. The fourth is, when the Wife
doth make an Elopement from her Hus-
band, and doth altogether cohabit with
the Adulterer, such Child is not to be
ascri-



ascribed to the Husband, but to the Adulterer; unless it be proved that the Husband had free Access unto the Mother. *Br. Bastardy, 4.*

II. Of the Limitations in in the Civil Law.

What Limitations or Restrictions are to be found in the Imperial Laws, as to the general Maxim, *viz. That a Child born during Marriage betwixt the Husband and Wife, is the Husband's Child*, the Lawyer *Ulpian* in his Ninth Book to *Sabinus* can inform us:

Suppose, saith he, that the Husband hath been absent from his Wife Ten Years, and returning finds with his Wife a Child of a Year old; in that case he agrees with *Julianus*, That it is not the Husband's Child. But whereas the same *Julianus* affirms, That it is not to be endur'd, that he who cohabits with his Wife should disclaim her Child as none of his; *Ulpian* admits not this without a distinction, but holds with *Scævola*, That if it be notorious, that the Husband, by reason of Sicknefs, or some other Impediment, could not lie with his Wife, or were disabled from getting

D. I. 6. 6.

The Law of Bastardy:

getting a Child, although one be born in the same House, and the Neighbours had taken Notice thereof; it ought not to be reputed his Child. And good Reason there is for it; for seeing Law is but an Art of Right and Good by Imitation of Nature, it were against all Right and Reason, that he should be judged the Father of that Child by Presumption of Law, which he could not beget by Possibility of Nature; and this holds not only in the case of Disability by grievous Sickness; but also in the Case of Impotency, by reason of Old Age. For howsoever it may seem a Paradox to some, yet it is commonly received for a true Conclusion amongst the Learned, that as a Woman in process of time becometh Barren, namely, after fifty Years; so a Man also is at length deprived of the Ability of begetting a Child; that is to say, at four score Years, if not before. But though it be thus among the Civil Lawyers, yet it is otherwise at the Common Law; For that says, *Quod in Regno Angliæ vulgo creditur, senes etiam plus quam octoginarios, hac potestate non esse penitus orbatos, eorumque liberi communiter reputantur legitimi, & proinde succedunt ijs, ac reliqui hoc impedimento non obstante.*

Mascard. de
probat. concl.
788. n. 43. 44.
Palæor. de
Noth. & Spur.
c. 24. n. 3.
Tiraquel. de
Leg. Conub.
Socin. Consil.
65. vol. 3.
Parif. Consil.
29. vol. 2.

Note,

Note, It is related in History, That Masinissa, King of the Numidians, got Children at 86 Years of Age, and at 92 vanquished the Carthaginians.

SECT.

SECT. X.

Those that are Born contrary to the usual Time of Womens Delivery, after the Decease of their Husbands, how to be reputed.

HAVING shewn in what Cases Issue born within Wedlock shall be accounted a Bastard, and in what Cases not, I come to demonstrate out of the Civil and Common Laws, the Legitimacy or Illegitimacy of such Issue as is brought into the World after the Death of the Husband, *contra tempus pariendo mulieribus constitutum.*

I. What time the Civil Law has allotted for a Woman to be brought to Bed.

The time of Conception, when it was, may best be known by relation to the Birth of the Child: For a Woman cannot bring forth a perfect Child before the beginning of the Seventh Month,

Month, saith the Lawyer *Paulus*, who grounds himself upon the Opinion of *Hippocrates*, D. 1. 5. 12. neither can she bear a Child in her Womb after the end of the Tenth Month from the time of the Conception at least by Presumption of Law. D. 38. 16. 3. 11, and 12. D. 28. 2. 29. cod. 5. 9. 2. except it be for one, two or three Days more at the farthest. *Salmo* in l. Gallus D. de lib. & Posthu. Menoch. de Arb. jud. quest. lib. 2. cas. 89. n. 41.

The Emperor *Justinian*, speaking of N. 39. cap. 2. her that was brought to bed the eleventh Month after her Husband's Decease, has provided, *That such as are born in the beginning of the same Month, are to be accounted for Legitimate, but such as are born in the end thereof, are to be bolden for Bastards.*

The Gloss doth relate a Matter of Fact contrary to this Law of *Justinian*: *A Widow in Paris that was delivered of a Child the fourteenth Month after her Husband's Decease, nevertheless, the good Repute which was generally conceived of this Woman's Continnence, prevailed so much against the Letter of the Law, That the Reverend Judges awarded the Causes of such Child-Birth to be extraordinary, the the Woman to be chaste, and the Child legitimate.*

Gothofredus ad
n. 39. c. 2.
Ridley's View
of Laws. part 1.
c. 3. sect. 5.
pag. 73. edit.
1675.

The Law of Bastardy.

gitimate. There was the like Judgment given in the Consistory at *Wirtenburgh*, in Case of a Woman who was brought to bed in the eleventh Month after her Husband's Death.

II. *What Time the Law of England hath appointed a Woman to be brought to Bed, after her Husband's Decease.*

It hath been adjudged by the Common Lawyers in the Reign of King **E. 1.** that the Issue born after nine Months, or forty Weeks after the Husband's Decease, is a Bastard: For it
 Trin. 18 E. 1. was found by Verdict, that Henry the
 Rot. 61. Bedf Son of Beatrice, which was the Wife of
 coram Rege. Robert Radwell deceased, was born *per undecim dies post ultimum tempus legitimum Mulieribus constitutum*: And thereupon it was resolved, *Quod dictus Henricus dici non debet filius prædicti Roberti secundum Legem & Consuetudinem Angliæ constitut.* Now *Legitimum tempus* (saith Coke) in that Case appeareth by the Law at the furthest, is nine Months or Forty Weeks, but she may be delivered before that time; which Judgment indeed doth agree with that in *Esdras*,
Go thy Way to a Woman with Child, and ask

ask of her, when she hath fulfilled her nine ² Eldras 4 Months if her Womb may keep the Birth ⁴⁰ 41. any longer within her? Then said I, No, Lord.

But since that (*viz.* in the seven-teenth Year of the Reign of King James the First) our Lawyers were not so strict in their Determination of the Time of a Woman's being brought to Bed; For Croke reports, That a Widow being delivered of a Child forty Weeks and nine Days, after her Husband's Death, the Child was adjudged to be legitimate. The Case at large is this:

In an *Ejectione Firme* for Lands in Munden in the County of Hertford, the Question upon Evidence to the Jury was, whether Edmund Andrews, dying the three ² twentieth of March, Anno 1610. and A. his Feme being Private-ment Enfeint, but not delivered until the fifth of January 1611. (which was forty Weeks and nine Days, and then delivered of a Daughter, named Elizabeth) shall be reputed the Father of the said Elizabeth, or that she were a Bastard; for it was proved, that he fell sick upon the two and twentieth Day of March, and died the Day following of the Plague: and that Edmund Andrews (Father of the said Edmund who was

Cro. Jac. 541.
Alfop versus
Bowtrell.

The Law of Bastardy.

Was dead) in Malice to his Son's Wife, did abuse her, and caused her to be dislodged from place to place, and to lie in the cold Streets; and she was so used for six Weeks together before her Delivery; and she being brought into a Woman's House, who commiserated her Case, having Warmth and Sustenance, was presently, within 24 Hours, delivered of the said *Elizabeth*. And this Misusage being proved by five Women of good Credit, and two Doctors of Physick, *viz.* Sir *William Paddy* and Dr. *Mundford*, and one *Chamberlain* (who was a Physician, and in nature of a Midwife) upon their Oath, affirming that the Child came in time convenient to be the Daughter of the said *Edmund Andrews* deceased; and that the usual time for a Woman to go with Child was nine Months and ten Days, *viz.* *Menses Solares*, that is, thirty Days to the Month, and not *Menses Lunares*; and that by reason of the Want of Strength in the Woman or the Child, or by reason of ill Usage, she might be a longer time, *viz.* to the end of ten Months, or more; and so both ancient and modern Authors, and Experience prove.

The

The Court held here, that it might well be as the Physicians had affirmed, that ten Months may be said properly to be the time *Mulieribus pariendo constitutum*. Against this a Record was produced, *Trin. 18. E. 1. Rot. 13.* in this Court, that because a Woman went eleven Months after the Death of her Husband, it was resolved that the Issue was not legitimate, being born *post ultimum tempus Mulieribus pariendo constitutum*. But note, it is not there shewed what was *ultimum tempus Mulieribus pariendo constitutum*. And the Physicians affirmed that a perfect Child may be at the seven Month, according to the Strength of the Mother, or of the Child himself, which is as long before the time of the proper Birth; and by the same reason it may be as long deferred by Accident, which is commonly occasioned by Infirmities of the Body, or Passions of the Mind: And so the Court directed the Jury, *That the said Elizabeth, who was born forty Weeks and more after the Death of the said Edmund Andrews, might well be the Daughter of the said Edmund.*

S E C T. XI.

In what Cases Bastard eigne may gain the Right of Inheritance against the Mulier puisne, and in what not.

IT will not be here impertinent, before I come to shew in what Cases a Bastard may acquire the Right of Inheritance, to give an account of the Law-Term *Mulier*.

Terms of Law,
f. 124. a. b.
Verbo *Mulier*.

Mulier then is a Word used in our Common Law, but how aptly, as the Author of the new Terms of Law saith, he could not tell; for according to the proper signification, *Mulier* is a *Defiled Woman*, like as it is used in *Ulpian* in a certain place, after this sort: *If I thought that I had bought a Virgin, when she was a defiled Woman, the Bargain was not good.* Hereby you may see, that *Mulier* is a Woman that had known a Man. But to learn the right Signification, *Mulier* is taken in our Law for one that is lawfully begotten, and born; and is always used in opposition to

to a Bastard. As for Example, A Man hath a Son by a Woman before Marriage, that is called a *Bastard* and unlawful; and after he marrieth the Mother of the *Bastard*, and they have another Son, this second Son is called *Mulier*, that is to say lawful, and shall be Heir to his Father: But the other cannot be Heir to any Man, because it is not known nor certain in the Judgment of the Law, who was his Father, and for that Cause is said to be *no Man's Son*, or *the Son of the People*: And always you shall find this Addition to them [*Bastard eigne* and *Mulier puisne*, *Bastard eldest* and *Mulier youngest*] when they be compared together. See more of this Word *Mulier* in *Minshieu*, 481. *Cowell*, Verbo *Mulier*, Co. Lit. 223. b. & lib. 8. 102. *Lechford's Case*, *Glanvill* lib. 7. c. 1. *Britton* cap. 70. Mr. *Skene de Verborum significatione*, Verbo *Mulieratus Filius*, D. 31. 1. 81. *De Leg.* 3. D. 50. 16. 13.

Thus much (and it may be too much) of the Word *Mulier*; come I now to treat of that Learning which relates to *Bastard* and *Mulier*, and this shall be performed by way of *Query* and *Solution*.

The Law of Bastardy.

Q. 1. Whether the dying seized of the Bastard eigne without Interruption, shall barr the Right of the Mulier puisne?

Sol. If a Man (saith Littleton) be seized of certain Lands in Fee, and hath Issue two Sons, and the Elder is a Bastard, and the Younger Mulier, and the Father die, and the Bastard entreth, claiming as Heir to his Father, and occupieth the Land all his Life, without any Entry made upon him by the Mulier, and the Bastard hath Issue and dieth seized of such Estate in Fee, and the Land descend to his Issue, and his Issue entreth, &c. in this Case the Mulier is without Remedy: For he may not enter, nor have any Action to recover the Land, because there is an ancient Law in this case used, namely, *Iustum non est aliquem post mortem facere Bastardum, qui toto tempore vitæ suæ pro legitimo habebatur.* Co. Litt. 244. a. Co. lib. 8. f. 101. Lechford's Case, 12 E. 1. Bastardy, 28, 29 E. 3. 14. 39 Aff. pl. 10.

Litt. sect. 400. But it is to be noted, That this shall be intended where the Father hath a Son Bastard by a Woman, and after the Espousals he hath Issue by the same Woman, a Son or Daughter, and after the Father

Father dieth, &c. If such Bastard enters, &c. and hath Issue, and die seized, &c. then shall the Issue of such Bastard have the Land clearly to him, as 'tis said before, &c. and not any other Bastard of the Mother, which was never married to his Father. And this seems to be good and reasonable; For such a Bastard born before Marriage celebrated between his Father and Mother, by the Law of Holy Church is *Mulier*, albeit by the Law of the Land he is a Bastard; and so he hath a Colour to enter, as Heir to his Father, for that he is by one Law *Mulier*, *scil.* by the Law of Holy Church. But otherwise it is of a Bastard, which hath no manner of Colour to enter as Heir, infomuch as he can by no Law be said to be *Mulier*; for such a Bastard is said in the Law to be *Quasi nullius Filius*.

Q. 2. Whether the dying seized of a Bastard eigne without a Descent can be a Bar to the Mulier?

Sol. If the Bastard dieth seized without Issue, and the Lord by Escheat enters, this dying seized shall not bar the *Mulier*, because there is no Descent. *Co. Lit. 244. a.*

Br. Escheat 34. says, Where there is a Bastard elder and a Legitimate younger, and the Bastard enters and dies seized without Issue, the Land shall not Escheat.

If the Bastard dieth seized, his Wife *enseint* with a Son, the *Mulier* enters, the Son is born, the Issue of the Bastard is barred; for that there must not only be a dying seized, but also a Discent to the Issue of the Bastard. But otherwise the Law is, where the Bastard enters and the *Mulier* dieth, his Wife *priveement enseint* with a Son, the Bastard hath Issue and dies seized, the Son of the *Mulier* is born, his Right is bound for ever. Co. Lit. fol. 244. 2.

Q. 2. Two Daughters, Bastard and *Mulier* entring and occupying as Heirs, and the Bastard having Issue, and dying, whether the Issue of the Bastard be inheritable?

Sol. If a Man hath Issue two Daughters, the eldest being a Bastard, and they enter and occupy peaceably as Heirs, now the Law in favour of Legitimation shall not adjudge the whole Possession in the *Mulier* (who then had the only Right) but in both, so as if the

The Law of Bastardy.

103

the Bastard hath Issue and dieth, her Issue shall inherit. *Co. Lit.* 244. a. 17 E. 3. 59. *Co. lib.* 8. f. 101. b. *Lechford's Case.*

Q. 4. Whether a dying seized, and a Discent can bar an Infant?

Sol. It is holden, that if the *Mulier* be within Age at the time of the dying seized, that nevertheless he shall be barred, because the Issue of the Bastard is in Judgment of Law become lawful Heir, and the Law doth prefer *Legitimation* before the Privilege of Infancy. *Br. Descent* 49. *Plowden's Com.* *Stowell's Case*, *Co. Lit.* 244. a. *Co. lib.* 8. 101. a. *Lechford's Case.*

In an Affize the Case was, *A.* seized in Fee has Issue *B. Bastard elgne* and *C. Mulier puisne*, and dies; *B. Bastard* enters and dies seized, having Issue *D.* and the *Mulier* has Issue *E.* and dies: Here if the Descent be in the time of the *Mulier* that is of full Age, then the Heir of the *Mulier* has no Remedy: But if the Descent of the Bastard to his Heir had been in the time of the *Mulier*, during his Nonage, then the Entry of the *Mulier* had been lawful. *Br. Descent* 26. 31. *Afs. pl.* 18. *Br. Descent* 29. *Br. Entry Congeable* 68.

Fitz. Tit. Verdict 48. says that the best Opinion is, That the *Mulier*, being within Age shall not be barred.

Q. 5. Whether the Bastard's being seized and a Descent can bar the Mulier, notwithstanding the Wife of the Bastard be endowed?

Sol. If the Bastard dies seized, and his Issue endoweth the Wife of the Bastard, yet is not the Entry of the *Mulier* lawful upon the Tenant in Dower, for his Right was barred by Descent. *Co. Lit.* 244. a. *Co. lib.* 8. 101. b. *Lechford's Case.*

Q. 6. Whether a Collateral Heir can be as well barred by a Descent, as the Mulier himself?

Sol. If a Man hath Issue a *Bastard* *eigne* and dies, the Bastard entreth, and dieth seized, and the Land descendeth to his Issue, the Collateral Heir of the Father is bound, as well as where there be two Sons. *Co. Lit.* 244. a. *Co. lib.* 8. 101. b. *Lechford's Case.*

Q. 7.

Q. 7. Whether the Entry and dying seized of the Son of a Bastard eigne as Heir to his Grandfather, shall bar the Mulier?

Sol. If a Man hath Issue Bastard eigne and Mulier puisne, and the Bastard in the Life of the Father hath Issue, and dieth, and then the Father dieth seized, and the Son of the Bastard enters, as Heir to his Grandfather, and dieth seized, this Descent shall bind the Mulier. Co. Lit. 244. b. Co. lib. 8. f. 101. b. Lechford's Case.

Q. 8. Whether the Agreement of the Mulier to the Entry of a Stranger can be a good Claim to avoid the Estate of the Bastard.

Sol. A stranger in the Name of the Mulier, without his Commandment, cannot enter upon the Bastard, for that the Bastard may gain the Estate, and bar the Mulier. And therefore regularly none should enter but the Mulier, or some other by his Commandment; for if the Mulier agree thereunto before the Descent of the Bastard, the Claim is good, and shall avoid the Estate of the Bastard, *Quia omnis Ratihabitio retroba-*

The Law of Bastardy.

prohabetur, & mandato equiparatur. Co. Lit. f. 245. a.

Q. 9. *Whether a Bastard after his Entry can be vouched only, by reason of the Warranty of his Ancestor?*

Sol. If the Bastard eigne take the Profits, he shall be vouched only, and not the Bastard and the *Mulier*, because the Bastard is in appearance Heir, and shall not disable himself. 17 E. 3. 59. 32 E. 3. Voucher 24. 5 H. 7. 2. Co. Lit. f. 376. b. Co. lib. 8. 101. b. *Lechford's Case*.

Q. 10. *Whether a Descent of the Bastard be a Bar against Strangers, as against the Mulier?*

Sol. Land is given to *A.* in Tail, Remainder to *B.* in Tail; *A.* the first Tenant in Tail has Issue a Bastard and a *Mulier*, and dies seized; the Bastard enters and continues in Possession, and has Issue, and dies; the Issue enters, the *Mulier* dies without Issue: *B.* in the second Remainder in Tail may have a *Formedon en le Remainder* against the Issue of the Bastard, and the Continuance of the Possession shall not prejudice the second Remainder-Man, for such Descent of the Bastard is no Bar, but against the *Mulier* and his Heirs that are

are privy, and not against Strangers.
Br. Descent 16. 39. 1. 3. 38. vide *Co. Lit.*
 244. a. *Co. lib.* 8. *Lechford's Case*.

Q. 11. Whether the continual Claim made by the Mulier shall avoid the Descent of the Bastard?

Sol. In an Affize the Case was thus: The Bastard enter'd and the *Mulier* made continual Claim; the Bastard died seized, and his Heir entered, the *Mulier* entered upon him, and the Heir of the Bastard ousted him, and the *Mulier* brought his Affize: It was in this Case adjudged, that this continual Claim should avoid the Descent of the *Bastard*.
Br. Bastardy 13. 14 *H.* 4. 9, 10.

Q. 12. What Acts shall be reputed in Law, Interruptions of the Possession of Bastard eigne, and what not?

Sol. In answer to this Query, I will first propound some Acts that will prove in Law Interruptions, and then other some that cannot be said in Law to amount to such.

I. *Acts*

I. Acts that are Interruptions of the Possession.

1. If after the Decease of the Father the *Mulier* be found Heir, and within Age, and the King seizeth, in that Case the Possession of the King is in the Right of the *Mulier*, and vesteth the actual Possession in the *Mulier*; and consequently the *Bastard eigne* is foreclosed of any Right for ever. *Co. Lit.* 245. b.

2. When the King seizeth for a Contempt, or other Offence of the Father, or of any other Ancestor, in that Case, if the Issue of the *Bastard eigne* upon a Petition be restored, for that the Seizure was without Cause, the *Mulier* is not barred; for the Bastard could never enter, and consequently could gain no Estate in the Land, but the Possession of the King in that Case shall be adjudged in the Right of the *Mulier*. *Co. Lit.* 245. b. and Coke adds hereunto this Observation, That the Bastard must enter *in vacuam Possessionem*, and continue during his Life, without Interruption made by the *Mulier*. *Vide Littleton* sect. 401.

3. If

3. If the *Mulier* cometh upon the Ground and cutteth down a Tree, or diggeth the Soil, or take any Profit, these shall be Interruptions, for rather than the Bastard shall punish him in an Action of Trespass, the Act shall amount in Law to an Entry, because he hath a Right of Entry. *Co. Lit. f. 245. b.*

4. If the *Mulier* put any of his Beasts into the Ground, or command a Stranger to put in his Beasts, these do amount to an Entry. For albeit in these Cases the *Mulier* doth not use any exprefs Words of Entry; yet these and such like Acts do without any Words amount in Law to an Entry: For Acts without Words may make an Entry, but Words without an Act (*viz.*) Entry into the Land, &c.) cannot make an Entry. *Co. Lit. 245. b.*

II. Acts

II. *Acts that are no Interruptions of the Possession.*

1. If the *Bastard eigne* after the Decease of the Father entereth, and the King seizeth the Land for some Contempt supposed to be committed by the Bastard, for which no Freehold or Inheritance is lost, but only the Profits of the Land by way of seizure, and the Bastard die, and his Issue is upon his Petition restored to the Possession, for that the Seizure was without Cause, the *Mulier* is barred for ever; for the Possession of the King, when he hath no Cause of seizure, shall be adjudged the Possession of him for whose Cause he seized. *Co. Lit. f. 245. b.*

2. If the Bastard invite the *Mulier* to see his House, and to see Pictures, &c. or to Dine with him, or to Hawk, Hunt, or Sport with him, or such like, upon the Land descended, and the *Mulier* cometh upon the Land accordingly, this is
no

The Law of Bastardy.

III

no Interruption, because he came in by the Consent of the Bastard ; and therefore the coming upon the Land can be no Trespass. *Co. Litt.* 245. b. 368. a.

SECT.

SECT. XII.

How the Laws, both Common and Civil, have provided Remedy against Supposititious Births, for the Benefit of right Heirs.

FOR the Benefit and Safety of true and legitimate Heirs against false and fictitious Births, the *English*, as well as the *Roman* Laws have very well provided, as shall be evidenced by the Common and Civil Law Texts.

First, Of the Remedy provided by the Common Law against False Births.

In Old Time Women used now and then to feign themselves to be left with Child, and have owned borrowed Brats, to deprive the Deceased Husband's right Heir of his Inheritance; sometimes of their own mischievous Malice and Deceitfulness, and sometimes by Consent of, and Combination with

The Law of Bastardy.

113

with the Lords of whom the Lands were holden.

Bracton in his second Book, cap. 32. f. 69. a. b. hath a large Discourse, *De partu Supposito*, concerning a Supposititious Birth; and there is a Writ to the Sheriff, to call before him and the Keeper of the Pleas of the Crown, the Woman that pretendeth to be *Enseint*, to have her examined by Tractation and Search of good and lawful Women, *per Utera, & per Ventrem*, whether she be pregnant or no, and if the matter be found doubtful, to commit her to a Castle and close Custody, without Access of any suspected Woman, *Quousque de partu suo constare possit*. And this Writ to the Sheriff was made use of in the Fifth Year of *H. 3.* in the Case of *Mariell*, Widow of *William Constable* of *Manton* in the County of *Norfolk*; which *Mariell* was then found Guilty of this kind of Cozenage:

The like Course against false Births may be found in *Fleta*, lib. 1. c. 15. n. 1 & 2. and *Britton* cap. 66. f. 165. b. and 166. a.

Having given a short Account of the Law in *H. 3.* his time *contra Partus Suppositos*, I will now speak of the Writ
f De

The Law of Bastardy.

De Ventre Inspiciendo (to be found in the Register) by which the Law hath provided Remedy for the Advantage of right Heirs against false Births; of which said Writ the Rule in the Register is this:

Register fol.
217. a.

Si quis habens hæreditatem duxerit aliquam in Uxorem, & postea moriatur ille sine Hærede de Corpore suo exeunte, per quod Hæreditas illa Fratri ipsius defuncti descendere debeat, & Uxor illa dicit se esse pregnantem de ipso defuncto cum non sit: Habeat Frater & Hæres ejus Breve de Ventre inspiciendo. The very Form whereof is thus:

Rex, &c. Uic' salutem. Monstrabit nobis A. quod cum R. que fuit Uxor Clementis, pregnantis non sit: Ipsa falso dicit se esse pregnantem de eodem Clemente, ad exheredationem ipsius A. de sicut terra que fuit ejusdem ad ipsum A. jure hereditario descendere debeat, tanquam ad fratrem & heredem ipsius. Si predicta R. prolem de eo non habuerit. Et quia tantam malitiam, si excogitata fuerit, volumus impedire; Tibi precipimus quod assumptis

The Law of Bastardy.

115

ptis tecum duodecim discretis & legalibus militibus, & duodecim discretis & legalibus mulieribus de Comitatu tuo, in propria persona tua accedas ad prefatam R. & eam coram prefatis militibus videri, & diligenter examinari, & tractari facias per Utera & Ventrem in omnibus modis, quibus melius certiorari poteris, utrum impregnata sit necne. Et si ipse mulieres ipsam R. impregnata inuenerint: Tunc diligenter inquiras ab eis de tempore quo ipsam crederint fore parituram. Et inquisitionem, quam inde feceris, scire facias Iustitiarijs nostris ad proximam Assisam, &c. vel Iustitiarijs nostris apud W. tali die evidenter & distince per literas tuas sigillatas, & per duos Milites ex ipsis qui inquisitioni illi interfuerin, ut cognita inde veritate, quod iustum fuerit faciamus.

The Law of Bastardy.

That the Learning which belongs to our Writ *De Ventre Inspiciendo* may be the better understood, I shall subjoin Sir *Edward Coke's* Exposition on some of *Bracton's* Words; as also where and how this Writ has been awarded, with the Proceedings thereupon in the Reigns of Queen *Elizabeth* and King *James* her immediate Successor.

I. Of *Coke's* Comment or Exposition.

It seems by *Bracton* (saith *Coke*) that the Writ *De Ventre Inspiciendo* doth lie, *ubi Uxor alicujus in vita Viri sui se pregnantem fecit, cum non sit, vel post mortem Viri sui se pregnantem fecit cum non sit, ad exhæredationem Veri Hæredis, &c. ad querelam Veri Hæredis per præceptum Domini Regis, &c.* which is to be understood according to the aforefaid Rule of the Register: When a Man (saith he) having Lands in Fee-simple dieth, and his Wife soon after marieth again, and feigns her self with Child by her former Husband; in this Case, though she be married, the Writ *De Ventre Inspiciendo* doth lie for the Heir. But if a Man seized of Lands in Fee, and hath Issue a Daughter, who is Heir apparent, she in the Life of her Father shall not have this Writ, and that for divers Causes:

First,

First, Because she is not Heir, but Heir apparent; for *nemo est Hæres viventis*, and this Writ is given to the Heir to whom the Land is descended: and both *Bracton* and *Fleta* saith, That this Writ lieth *ad Querelam Veri Hæredis*, which cannot be in the Life of his Ancestor.

Secondly, The Law doth not give the Heir apparent any Writ, for it is not certain whether she shall be Heir, *Solus Deus facit Hæredes*.

Thirdly, The Inconvenience were too great, if Heirs apparent in the Life of their Ancestor should have such a Writ to examine and try a Man's lawful Wife in such sort as the Writ *De Ventre Inspiciendo* doth appoint, and if she be found to be with Child, or suspect, then she must be removed to a Castle, and there safely kept until her Delivery, and so any Man's Wife might be taken from him against the Law of God and Man.

II. *Where and how the Writ De Ventre Inspiciendo hath been awarded, &c. in the Reigns of Queen Elizabeth and King James.*

Gro Eliz. f.

566. Willoughby's Case,

In the nine and thirtieth Year of the Reign of Queen *Elizabeth*, *Percival Willoughby* and *Bridget* his Wife, one of the Co-heirs of Sir *Francis Willoughby*, (because Sir *Francis Willoughby* died seized of a great Inheritance) having Five Daughters, whereof the eldest was married to *Percival Willoughby*, and not any Son: and the said Sir *Francis* leaving his Wife *Dorothy*, who, at the time of his Death, pretended her self to be with Child by Sir *Francis*, which if it were a Son, all the five Sisters should hereby lose the Inheritance descended unto them) prayed a Writ *De Ventre Inspiciendo*, out of the Chancery, directed to the Sheriff of *London*, that he should cause the said *Dorothy* to be viewed by twelve Knights, and searched by twelve Women, in the Presence of the twelve Knights, & *ad tractandum per Utera & Ventrem inspiciendum*, whether she were with Child, and

and to certify the same into the Common Bench; and if she were with Child, to certify for how long time in their Judgments, & *quando sit paritura*. Whereupon the Sheriff accordingly caused her to be searched, and returned, That she was twenty Weeks gone with Child, and that within twenty Weeks *fuit paritura*. Whereupon another Writ issued out of the Common Bench, commanding the Sheriff safely to keep her in such a House, and that the Doors should be well guarded, and that every Day he should cause her to be viewed by some of the Women named in the Writ (wherein ten were named) and when she should be delivered, that some of them should be with her to view her Birth, whether it be Male or Female, to the end there should not be any Falsity. And upon this Writ the Sheriff returned, That accordingly he had caused her to be kept, &c. and that such a Day she was delivered of a Daughter. *Vide Moor's Reports* 23. n. 692.

In the two and twentieth Year of the Reign of King James the Case was thus; *Alphonsus Theaker*, Cousin Case, and Heir of *William Theaker*, after the
I 4 Death

The Law of Bastardy.

Death of *William Theaker*, who died the fifteenth of *February*, 1623. without Issue, but *Mary* his Feme was then supposed to be *Enseint* by him, and she was married again to one *John Duncomb* within a Week after the Death of her Husband) procured out of the Chancery a Writ *De Ventre Inspiciendo*, to inspect the said *Mary*, directed to the Sheriffs of *London*, to cause the said *Mary* to be searched, whether she were with Child by the said *William Theaker*, & *quando fuit paritura*, (no mention being made of her second Marriage) and this Writ was according to the Precedent of 39 *Eliz.* of the like Writ against the Lady *Wilmington*; and this Writ was retornable in the Common Bench. The Sheriff returned, that he had caused her to be searched, and returned the Inquisition, That by such Persons he caused her to be searched, and found her to be *Enseint*, & *quod fuit paritura* within twenty Weeks; wherefore he now prayed a second Writ out of this Court to be directed to the Sheriff of *Surry*, because she was removed with her Husband to *Wandsworth* in *Surry*, and there inhabited, that the Sheriff may take her into his Custody, and keep her until she were delivered of her Child,

Child, that there might not appear to be any false or *Supposititious* Birth; and that in the interim he should cause her to be viewed every Day by certain Matrons named by the Court in the Writ; and that some of them should be at the Birth of the Child, according to the said Precedent of the Lady *Willoughby*: But because in that Case the Lady was a Widow, and so such Course might there well be observed: But here, she being a Feme Covert, who ought to cohabit with her Husband, they would not take such a Course with her, but left her with her Husband, he entring into a Recognizance that she should not remove from the House wherein then they inhabited, and that one or two of the Women returned by the Sheriff, should see her every Day, and that two or three of them should be present at her Travail; For it was said that this Issue may be well said to be the Child of the first Husband, and should inherit his Land: so as if there were any false or *Supposititious* Birth, the Cousin and Heir might be disinherited. Wherefore a Writ was accordingly awarded to the Sheriff of *Surry*, to cause her to be seen every Day, until her Delivery, by two at least of the said Women returned

The Law of Bastardy.

turned by him; and that three of them, or more, should be present with her at her Delivery, so as no Falshood might be in her Birth.

After this Course observed, she was delivered of a Female Child, who was afterwards, by Inquisition, found to be the Daughter and Heir of the said *William Theaker* deceased.

Hitherto of the Remedy provided by the Common Law of *England* against Supposititious Births.

Secondly,

Secondly, Of the Remedy provided by the Civil Law of the Romans against false and supposititious Births.

How to prevent Cheats in Womens Labours, or otherwise false Births, or adulterous Children instead of true and rightful Heirs: Or (if you will) to hinder any false Child from being put in the Place of the true one, and that the Wife abuse not her Husband or the next Heir with a false Shew of that which is not, there is a notable Edict in the *Roman Law*, says the famous Lawyer *Ulpian*, set forth by the Pretor for the visiting of Big-bellied Women, and the looking after what may be born by them.

The

The Words of which Edict are in English thus :

D. 25. 4. 1.
10. De Inspi-
ciendo Ventre
custodiendoque
partu.

“ If a Woman upon her Husband’s
“ Death pretends that she is with Child,
“ she must intimate that twice every
“ Month thereafter, to those who are
“ the most concerned in it, or to their
“ Proxies, that so they may send
“ some, if they think fit, to see her
“ Belly. They may send any Free-
“ Woman (*i. e.* not Slaves) to the
“ number of Five at most, and all
“ these together may visit her, provi-
“ ded that while they do it, none of
“ them may touch her Belly without
“ her leave. She shall be lodged in
“ the House of some Woman of an
“ untainted Reputation, such as shall
“ be named by the Pretor; and she
“ shall signifie to the Persons con-
“ cerned, or to their Proxies, thirty
“ Days before when she expects to be
“ delivered, that if they think fit, they
“ may send such as may watch over
“ her. The Room in which she is to
“ be brought to Bed shall be searched,
“ that there may be no other Entries
“ to it but one; and if there are any
“ other, care must be taken to nail
“ them up with Boards laid along both
“ within

The Law of Bastardy.

“ within and without; and at the
“ Door of this Bed-Chamber three
“ Free-men, with as many Free-women,
“ and two Servants may be set
“ to watch, as oft as the Woman thinks
“ fit to go into that Bed-Chamber,
“ or into any other, or into a Bath,
“ which those Keepers may search, if
“ they think fit, before she goes into
“ it, and may also search all that go
“ into it at that time; and those
“ Keepers may also, if they think fit,
“ search all as come within the House,
“ or the Bed-Chamber. When the Woman
“ falls in Labour she shall give
“ notice of it to those concerned, or
“ to their Proxies, that so they may
“ send such Persons who may be Witnesses
“ to the Birth; who must be
“ Free-women to the number of five
“ at most: and besides the two Midwives,
“ there must be no more Free-women
“ in the Bed-Chamber than
“ ten, nor more Servants than six.
“ All these who enter within the
“ Bed-Chamber shall be searched in the
“ Room, to see if any of them is with
“ Child; nor must there be fewer than
“ three Lights in the Room, because
“ an Imposture may be more easily
“ committed in the Dark. That which
“ is born shall be shewed to those who
“ are

The Law of Bastardy.

“are concerned, or to their Proxies,
 “if they desire it. The Infant is to be
 “kept by him who is named by the
 “Father for that intent; but if he has
 “left no Orders concerning it, or if
 “he who was named by him will not
 “undertake it, the Pretor, having exa-
 “mined the matter, shall name the
 “Person to whose keeping the Child
 “is to be trusted, whose Name shall
 “be published, and he shall be obliged
 “to shew him as he thinks fit, twice a
 “Month till he is three Months old;
 “and after that once a Month, till he
 “is six Months old; and once in
 “two Months till he is a Year old;
 “and from thence once in six Months,
 “till he can speak. But if any will not
 “suffer their Belly to be inspected,
 “nor themselves to be watched, nor
 “admit of Witnesses to their Delivery,
 “or if any thing is done for hindring
 “the Execution of those things that
 “are hereby provided, when upon the
 “hearing of the matter that is made
 “out, that which is born is not to be
 “admitted to the Possession of the
 “Estate; if it be found that the Child
 “has not been visited, according to
 “the former Regulations, in which
 “case the Pretor promises to give over
 “all Rights and Titles to those others,
 “whom

“ whom according to this Edict he has
“ put in Possession, and not to the
“ Child that is so born, the Justice
“ of the Cause being first made out to
“ him.

*Publice interest, partus non subjici, ut
ordinum dignitas, familiarumque salva sit.*
Ulpianus.

*Dignitates ordinum, & familiarum, sal-
vas, atque integras, quam fieri potest ma-
xime servare debemus.* Dionysius Gotho-
fredus.

It is of publick concern, that there
should be no Supposititious Births, and
that the Dignity of Families and of the
different Ranks of Men be preserved
entire.

F I N I S.

THE LAW OF THE STATE

OF THE STATE OF NEW YORK
IN SENATE
JANUARY 18, 1890

REPORT
OF THE
COMMISSIONER OF THE LAND OFFICE

IN RESPONSE TO A RESOLUTION
PASSED BY THE SENATE
MAY 18, 1889

ALBANY:
J. B. LIPPINCOTT & CO.
PRINTERS
1890

T H E T A B L E:

Whereby the Chief Matters in
each Foregoing Section con-
tained may be the more
readily found.

S E C T. I.

B <i>Astard, whence derived</i>	Pag. 1, 2
<i>What Appellations bestowed on Ba- stards by the Greeks, Civilians, Common Lawyers and Grammarians</i>	2, 3
<i>A Bastard why termed Nothus, Spurius and Favonius</i>	2, 3

S E C T. II.

<i>Bastard and Bastardy how defined</i>	4
<i>None can inherit by God's Law, not born in Matrimony</i>	5
<i>Why the Sons of Concubines were sent away Eastward by Abraham</i>	5

S E C T. III.

<i>How many Kinds of Bastards, according to the Common and Civil Laws</i>	6 to 10
K	Issue

The TABLE.

Issue Natural but not Lawful, Issue Lawful not Natural, both Lawful and Natural what and how distinguished	7
A difference between Natural Issue of the Body and Lawful Issue of the Body, a pretty Story of it	7, 8
Incestuous Marriages, Remarks concerning them	10 to 13
Incestus, what and whence derived	10
The Phrase Zonam Solvere, what it sig- nifies among the Romans	ibid.
Cestus, its Signification	ibid.
Adulterium & Stuprum, their Significa- tion and Difference	10, 11
Incestuous Persons how punished among the Romans, how punished by our Laws	13
By the Canon Law they are infamous	11
Concerning a Man marrying two Sisters suc- cessively, or a Woman two Brothers	13, 14

S E C T IV.

The Effects of Bastardy, it stains the Blood, renders a Man subject to Reproach	15, 16
Bastards are of no account in the Laws of England	18, 19
A Bastard can have no Heir but of his Body, and dying without Issue his Lands escheat.	19
He has no Kindred	ibid.
His Condition contemptible among God's People	ibid.
Bastards incapable of the Priesthood	20

Bastard

The TABLE.

<i>Bastard no Child within the Stat. of 32 and 34 H. 8. of Wills</i>	19
<i>A fine Story of a King's Bastard-Son</i>	20, 21
<i>Serious Considerations tendered to Mankind for the demonstrating the Dignity, Honour and Excellency of Matrimony</i>	16, 17, 18
<i>How Christ honoured a Wedding with his Presence and with a Miracle</i>	17
<i>Marriage received and approved by all Nations</i>	ibid.
<i>Punishments ordained by the Old Romans for those that would not marry</i>	ibid.
<i>The Papian Law concerning it</i>	ibid.
<i>What Privileges appointed by the Romans to invite Men to marry</i>	17, 18
<i>Why the Dowries of Women have always had great Privileges</i>	18
<i>The Privileges of such and such Romans as had such and such Children</i>	ibid.
<i>Bastardy, how it excludes from all Succession, descending either from the Father or Mother</i>	20
<i>A Bastard cannot inherit neither by the Common, Civil, nor Canon Law</i>	22, 23
<i>Some Queries started concerning Bastards</i>	24 to 34
<i>The Roman Laws made no Provision for Bastards, nor Solon's</i>	24
<i>The Canon Law provides Necessaries for Life</i>	ibid.
<i>Difference between the Laws Ecclesiastical and the Civil Laws about the Nourishment of Children</i>	K 2

The TABLE.

<i>Children begotten in Adultery and Incest</i>	25, 26
<i>The Laws and Statutes of this Realm touching their Maintenance</i>	26
<i>Bastards how far capable of any Benefit of the Laws of England</i>	26, 27
<i>The Flatteries of Harlots, how prejudicial to lawful Children and their Mothers</i>	ibid.
<i>By what Name a Bastard may purchase, and by what not</i>	28, 29
<i>Bastards in ancient times admitted to succeed to Dignities of the highest Condition</i>	30, 31
<i>And why</i>	32, 33
<i>The Law enacted by the French, That Bastards should not inherit the Crown</i>	33
<i>The Custom for Bastards to inherit Crowns, banished out of England and all other Countries of Europe</i>	ibid.
<i>What Grotius says against admitting Bastards to sit in Regal Thrones</i>	33, 34

S E C T. V.

<i>The several Ways of Legitimizing Bastards among the Romans.</i>	35, 36, 37
<i>Power vested in the Roman Emperors of Legitimizing those that were begotten in Incestuous Marriages</i>	37
<i>Pope of Rome cannot make Bastard-sons to inherit Lands Patrimonial</i>	ibid.
<i>No way here in England for Legitimizing them than by Parliament</i>	38
<i>The Charter of Legitimation of the Beauforts begotten by the Duke of Lancaster on the Body</i>	

The TABLE.

<i>Body of Katherine Swinford</i>	38, 39, 40, 41
<i>By this Charter no Title given them for claiming the Crown</i>	41, 42
<i>Adoption or Arrogation among the Romans of no use amongst us</i>	42
<i>Coke's sure way of Adopting an Heir</i>	43

S E C T VI.

<i>Difference between the Common, Civil and Canon Laws, in the Point of Legitimation by subsequent Marriages</i>	44, 45
<i>Constitution of the Bishop of Rome and the Labor of the Clergy to legitimate Children born before Marriage</i>	44, 45, 46
<i>How the Barons of this Realm were against it</i>	46
<i>Coke's Note upon their stout and courageous Answer</i>	ibid.

S E C T. VII.

<i>The Extent of the Jurisdiction of the King's Courts, both Spiritual and Temporal, as to the Trial of Legitimacy and Bastardy</i>	48
<i>Two sorts of Bastardy in our Law, namely, General and Special, and how they are de- scribed and diversified</i>	49, 50
<i>How each of them must be tried</i>	50 to 53
<i>What Child a Mulier and what a Bastard</i>	50, 51
<i>The Honour and Reverence allowed to the Lords Bishops, in the point of certifying Bastardy</i>	54, 55
	The

The TABLE.

<i>The bigb Credit and great Validity of a Bishop's Certificate</i>	55,56
<i>What's to be done before a Writ be sent to a Bishop to certify Bastardy</i>	56
<i>Rules to be observed for the right Trial of Legitimacy and Bastardy</i>	57 to 62
<i>Reason why the Ecclesiastical Judge must not enquire of Legitimacy or Bastardy before he has received a Command from the Temporal Court</i>	62
<i>Establishment of Possessions acknowledged by the Pope of Rome to belong to the King of England</i>	62,63

S E C T. VIII.

<i>Of Bastardy that happeneth subsequent to Marriage upon Divorce</i>	64
<i>Divorce, whence derived, and why so called</i>	ibid.
<i>Divorcements, their several sorts among the Romans</i>	65,66
<i>Divorce, how defined</i>	67
<i>Seperations, before whom they ought to be made</i>	ibid.
<i>The several Causes of Divorce, precedent and subsequent to Marriage</i>	68
<i>What Divorces (for Causes precedent to Marriage) bastardize the Issue</i>	69,70,71
<i>Divorce by Reason of Frigidity</i>	71,72
<i>The Civil and Canon Laws about Frigidity or Impotency</i>	72,73
<i>Cases of Frigidity put in the Common Law</i>	73,74
	Notes

The TABLE.

<i>Notes relating to Divorces</i>	75 to 78
<i>What things, viz. of Goods and Lands, the Woman is to take back again upon a Divorcement</i>	79 to 82

S E C T. IX.

<i>In what Cases the Issue born within Marriage may be accounted a Bastard, and in what not, according to the Common Law, as also according to the Civil</i>	83 to 87
<i>Limitations at Common Law to the Rule, viz. Pater est quem Nuptiæ demonstrant</i>	87, 88, 89
<i>Limitations to the said Rule in the Civil Law</i>	89, 90

S E C T. X.

<i>What time the Civil Law appoints for a Woman to be delivered</i>	92 to 94
<i>What time the Law of England allots for a Woman's Delivery after her Husband's Death</i>	94
<i>A Widow delivered of a Child forty Weeks and nine Days after her Husband's Death, whether the Child be legitimate</i>	95 to 97

S E C T. XI.

<i>In what cases Bastard eigne can gain the Right of Inheritance against Mulier puisne, and in what not</i>	98
<i>Account of the Law-Terms Bastard eigne and Mulier puisne</i>	98, 99
	Twelve

The TABLE.

<i>Twelve Queries with their Solutions, as to the Right of Inheritance between Mulier and Bastard</i>	99 to 107
<i>What Acts be Interruptions of the Possession between them</i>	108, 109
<i>And what are not</i>	110, 111

S E C T. XII.

<i>What Provision the Laws, both Common and Civil, have made against False Births</i>	111, 112
<i>The Law in Bracton's time against Suppo- sititious Births</i>	113
<i>Rule in the Register touching the Writ De Ventre Inspiciendo</i>	114
<i>The Form of the said Writ in Register</i>	114, 115
<i>Coke's Exposition and Reasons upon the Words of Bracton</i>	116, 117
<i>The Writ De Ventre Inspiciendo where and how awarded in the Reigns of Queen Elizabeth and her Successor King James the First</i>	118 to 122
<i>The Remedy provided by the Civil Laws of the Romans against false Births</i>	123 to 127

*A Plurality of Worlds, Written in French
by the Author of The Dialogues to the
Dead, Translated into English by Mr.
Glanvill. Price Bound 2 s. Printed for
Tho. Osborne in Grays-Inn near the Walks.*

